

EXHIBIT 16

Page 1

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:) SIPA LIQUIDATION
)
BERNARD MADOFF INVESTMENT) No. 08-01789 (SMB)
SECURITIES LLC,)
)
Debtor.) (Substantively
) Consolidated)
-----)

In re:)
)
BERNARD L. MADOFF,)
)
Debtor.)
-----)
IRVING H. PICARD, Trustee for)
the Liquidation of Bernard L.)
Madoff Investment Securities)
LLC,)
) Adv. Pro. No.
Plaintiff,) 10-04995 (SMB)
)
v.)
)

TRUST U/ART FOURTH O/W/O)
ISRAEL WILENITZ,)
)
EVELYN BEREZIN WILENITZ,)
individually, and as Trustee)
and Beneficiary of the Trust)
U/ART Fourth O/W/O Israel)
Wilenitz,)
)
SARA SEIMS, as Trustee of the)
Trust U/ART Fourth O/W/O)
Israel Wilenitz,)
)
Defendants.)
-----)

(CAPTION CONTINUED ON THE NEXT PAGE)

1	-----)	
	IRVING H. PICARD, Trustee for)
2	the Liquidation of Bernard L.)
	Madoff Investment Securities)
3	LLC,)
) Adv. Pro. No.
4	Plaintiff,) 10-04818 (SMB)
)
5	v.)
)
6	TOBY HARWOOD,)
)
7	Defendant.)
	-----)	
8	IRVING H. PICARD, Trustee for)
	the Liquidation of Bernard L.)
9	Madoff Investment Securities)
	LLC,)
10) Adv. Pro. No.
	Plaintiff,) 10-04914 (SMB)
11)
	v.)
12)
	EDYNE GORDON, in her capacity)
13	as the executrix and primary)
	beneficiary of the estate of)
14	Allen Gordon,)
)
15	Defendant.)
	-----)	
16	IRVING H. PICARD, Trustee for)
	the Liquidation of Bernard L.)
17	Madoff Investment Securities)
	LLC,)
18) Adv. Pro. No.
	Plaintiff,) 10-04826 (SMB)
19)
	v.)
20)
	ESTATE OF BOYER PALMER, DIANE)
21	HOLMERS, in her capacity as)
	Personal Representative of the)
22	Estate of Palmer, and BRUCE)
	PALMER, in his capacity as)
23	Personal Representative of the)
	Estate of Boyer Palmer,)
24)
	Defendant.)
25	-----)	

1 -----)
 IRVING H. PICARD, Trustee for)
 2 the Liquidation of Bernard L.)
 Madoff Investment Securities)
 3 LLC,)
) Adv. Pro. No.
 4 Plaintiff,) 10-04644 (SMB)
)
 5 v.)
)
 6 RUSSELL L. DUSEK,)
)
 7 Defendant.)
 -----)
 8 IRVING H. PICARD, Trustee for)
 the Liquidation of Bernard L.)
 9 Madoff Investment Securities)
 LLC,)
 10) Adv. Pro. No.
 Plaintiff,) 10-04541 (SMB)
 11)
 12 v.)
)
 KENNETH W. PERLMAN; FELICE J.)
 13 PERLMAN; and SANFORD S.)
 PERLMAN,)
 14)
 Defendant.)
 15 -----)
 IRVING H. PICARD, Trustee for)
 16 the Liquidation of Bernard L.)
 Madoff Investment Securities)
 17 LLC,)
) Adv. Pro. No.
 18 Plaintiff,) 10-04728 (SMB)
)
 19 v.)
)
 20 BRUNO DIGIULIAN,)
)
 21 Defendant.)
 -----)
 22
 23
 24
 25

1 -----)
 IRVING H. PICARD, Trustee for)
 2 the Substantively Consolidated)
 SIPA Liquidation of Bernard L.)
 3 Madoff Investment Securities)
 LLC and Bernard L. Madoff,)
 4) Adv. Pro. No.
 Plaintiff,) 10-04905 (SMB)
 5)
 v.)
 6)
 TRAIN KLAN, a Partnership;)
 7 FELICE T. LONDA, in her)
 capacity as a Partner in Train)
 8 Klan; CLAUDIA HELMIG, in her)
 capacity as a Partner in Train)
 9 Klan; TIMOTHY LANDRES, in his)
 capacity as a Partner in Train)
 10 Klan; PETER LONDA, in his)
 capacity as a Partner in Train)
 11 Klan; TIMOTHY HELMIG, in his)
 capacity as a Partner in Train)
 12 Klan; and WENDY LANDRES, in her)
 capacity as a Partner in Train)
 13 Klan,)
)
 14 Defendants.)
 -----)
 15 IRVING H. PICARD, Trustee for)
 the Substantively Consolidated)
 16 SIPA Liquidation of Bernard L.)
 Madoff Investment Securities)
 17 LLC and Bernard L. Madoff,)
) Adv. Pro. No.
 18 Plaintiff,) 10-004621 (SMB)
)
 19 v.)
)
 20 DONALD A. BENJAMIN,)
)
 21 Defendant.)
 -----)
 22
 23
 24
 25

1 TRUSTEE'S MOTION TO COMPEL DISCOVERY IN THE

2 THREE ADVERSARY PROCEEDINGS:

3

- 4 i) Picard v. Benjamin, Adv. Pro. No. 10-04621
- 5 ii) Picard v. DiGiulian, Adv. Pro. No. 10-04728
- 6 iii) Picard v. Train Klan, Adv. Pro. No. 10-04905

7

8 -and-

9 CHAITMAN LLP'S MOTION TO COMPEL DISCOVERY AND THE
10 TRUSTEE'S CROSS-MOTION FOR A PROTECTIVE ORDER IN ONE
11 ADVERSARY PROCEEDING, PICARD V. WILENITZ, ADV. PRO.
12 NO. 10-04995

13

14 -and-

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16 CHAITMAN LLP'S MOTION FOR PROTECTIVE ORDER AND QUASH
17 TRUSTEE'S DEPOSITIONS IN THE FOLLOWING ADVERSARY SIX
18 PROCEEDINGS:

19

- 20 i) Picard v. Perlman, Adv. Pro. No. 10-0454
- 21 ii) Picard v. Gordon, Adv. Pro. No. 10-04914
- 22 iii) Picard v. Harwood, Adv. Pro. No. 10-04818
- 23 iv) Picard v. Estate of Palmer, Adv. Pro. No.
24 10-04826
- 25 v) Picard v. DiGiulian, Adv. Pro. No. 10-04728
- vi) Picard v. Dusek, Adv. Pro. No. 10-04644

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2 TRANSCRIPT OF PROCEEDINGS

3 in the above-titled action, held on Tuesday,
4 December 13, 2016, at JAMS, 680 Eighth Avenue, New
5 York, New York, commencing at approximately 10:00
6 a.m., before Eileen Mulvenna, CSR/RMR/CRR, Certified
7 Shorthand Reporter, Registered Merit Reporter,
8 Certified Realtime Reporter, and Notary Public of
9 the State of New York.

10

1 B E F O R E:

2

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-and-

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25

1 THE ARBITRATOR: I thought we'd start
2 with a couple of housekeeping matters.

3 When we spoke in the telephone
4 conference call and implicit in Judge
5 Bernstein's rulings, or I guess really
6 explicit, is that the rulings I make will
7 apply to the other adversary proceedings to
8 which it's applicable.

9 But I assume that's something the two
10 sides will try to work out amongst
11 themselves?

12 MR. HUNT: Yes. I mean, I don't think
13 we're willing to beat our head against a wall
14 on things, but I think each of these cases
15 have some nuances that are different. So
16 there may be something that's easily
17 translatable, but sort of depends on the
18 issue, I think.

19 MS. CHAITMAN: But I actually -- this
20 is something that I've tried to work out
21 previously. I'm defending 92 of these
22 actions.

23 THE ARBITRATOR: You just answered
24 another question I had on the list. Go on.

25 MS. CHAITMAN: The thing is, it just

1 seems to me it's logical that if you rule
2 that the trustee has to produce X document, I
3 shouldn't have to make 92 applications for
4 that.

5 My sense is that if the judge makes a
6 ruling -- all of these cases are virtually
7 identical in the -- the complaints are
8 virtually identical. So why would one client
9 be entitled to a certain kind of discovery
10 and another wouldn't? I just think we could
11 simplify this so much if we could apply your
12 rulings to all of the outstanding cases that
13 I have.

14 THE ARBITRATOR: Why don't we leave it
15 as that would be a good thing to do. As we
16 get deeper into this, assuming there is a
17 deeper into this, we can try and work that
18 out.

19 It struck me that there were areas
20 like that. And I'm sure the trustee has a
21 reason, but by way of example, there was a
22 discussion before Judge Bernstein about the
23 Dubinsky report having been served in
24 Action A, but not Action B, although
25 Ms. Chaitman is counsel in both A and B. And

1 I assume that is a function of scheduling
2 issues. Is that --

3 MR. JACOBS: That's correct.

4 THE ARBITRATOR: Spell that out for
5 me, if you could.

6 MR. JACOBS: Sure. Most of
7 Ms. Chaitman's cases are either -- all of
8 them have their own independent case
9 management order. While there might be
10 groups of them that are roughly proceeding
11 together, they're all different.

12 So the expert disclosure dates differ
13 for each of those matters. In the Wilenitz
14 case, which is before you today, your Honor,
15 we served the Dubinsky report early to try to
16 avert some of the discovery disputes that
17 we're having here.

18 And also Ms. Chaitman has received
19 that report in the normal course of the offer
20 and case management order in a number of
21 other cases that aren't before you today.

22 The Dubinsky report at the moment
23 hasn't changed and that -- there has been a
24 revision, but not in any of Ms. Chaitman's
25 cases. And for a number of years now, it's

1 been the same report.

2 And there are additional reports that
3 are defendant-specific, as Ms. Chaitman
4 knows, that we served in each of the
5 adversary proceedings. And those haven't
6 been served yet because the offer and case
7 management orders don't call for the
8 disclosure of those experts yet.

9 THE ARBITRATOR: Those are Collura --

10 MR. JACOBS: And Greenblatt, correct.
11 Both of those reports have aspects of sort of
12 case law analysis, but they also apply that
13 to the specific transfers at issue with
14 respect to the specific defendants in each
15 case.

16 So Ms. Chaitman has seen those reports
17 in a number of her cases, just not the
18 Wilenz case or the others that are still in
19 fact discovery today.

20 THE ARBITRATOR: And I gather that
21 some, but not all of the issues that relate
22 to the individual Collura and Greenblatt
23 reports will also be the subject of the
24 omnibus profit withdrawal hearing that Judge
25 Bernstein contemplates?

1 MR. JACOBS: Potentially if the issue
2 with the proper withdrawal transactions is
3 that there are certain transactions reflected
4 on customers' statements that are being --
5 the nature of which are being litigated right
6 now in the claims proceeding you just
7 referenced, some of the defendants in some of
8 the cases have those type of transactions in
9 their account. So that would be relevant in
10 each of those adversary proceedings as well,
11 but not all. So --

12 THE ARBITRATOR: Are you talking about
13 inter-account transfers?

14 MR. JACOBS: No, I'm talking about --
15 so the profit withdrawal -- the profit
16 withdrawal in the trustee's contention was a
17 purported dividend on a stock reflected in
18 the customer statement, which was fraudulent,
19 that resulted in an actual check going to the
20 customer in cash.

21 So -- and Ms. Chaitman represents
22 Mr. Blecker, who I believe is the customer
23 whose claim was denied in our claims side of
24 the case. And she --

25 You can correct me if I'm

1 misconstruing your argument.

2 But some of the customers represented
3 by Ms. Chaitman are arguing that, in fact,
4 those profit withdrawal transactions did not
5 result in checks or cash that went to the
6 customer. So to that extent, that would be a
7 challenge to our net equity calculation.

8 So that's what's being litigated
9 before Judge Bernstein in the profit
10 withdrawal proceeding.

11 MS. CHAITMAN: But not with respect to
12 the claw-back defendants.

13 MR. JACOBS: Well, it's an issue that
14 may be relevant in discovery with the
15 claw-back defendants to the extent you're
16 challenging our calculation of net equity,
17 and the PW transactions specifically are part
18 of your challenge.

19 THE ARBITRATOR: I had thought there
20 was overlap, but you're telling me that
21 there's less overlap than I thought there
22 was, which is helpful to understand.

23 MS. CHAITMAN: My understanding was
24 that Judge Bernstein explicitly said we're
25 not litigating the profit withdrawal

1 contentions of the claw-back defendants in
2 the profit withdrawal litigation.

3 MR. JACOBS: That's correct. So right
4 now, I agree, to avoid any confusion, the
5 profit withdrawal issue is only being
6 litigated in the claims proceeding. It's not
7 part -- the adversary proceedings are -- the
8 defendants in the adversary proceedings where
9 that's an issue are not part of that
10 proceeding.

11 So presumably those issues may --
12 well, it will be -- we'll have to see how
13 Judge Bernstein wants to deal with any ruling
14 he'll issue on the claim side and its
15 applicability to the adversary proceedings.

16 In my mind, obviously, any ruling that
17 Judge Bernstein issues in any one of our
18 cases, including a discovery issue or any
19 ruling you may issue, if it's applicable to
20 the same set of facts or circumstances in any
21 other case, the trustee is going to follow
22 it.

23 Where it's not applicable, because
24 there are different circumstances or facts
25 that would render it -- would render the

1 outcome of the application of that decision
2 for that case inconsistent with the judge's
3 analysis or theory and ruling in the prior
4 proceeding, then we would argue it shouldn't
5 apply.

6 So just backing up to your question,
7 your Honor, about whether your rulings today
8 should apply universally in all cases, we
9 agree with Ms. Chaitman that where the facts
10 and circumstances of other cases are
11 identical, it absolutely should. Where they
12 aren't, it shouldn't.

13 If either side can make a good-faith
14 argument as to why it shouldn't apply -- and
15 as I stated to Ms. Chaitman in many prior
16 hearings before Judge Bernstein, after we
17 have the benefit of your ruling, we're happy
18 to meet and confer and enter into a
19 stipulation as appropriate where we can agree
20 as to the applicability of those rulings in
21 her other cases to avoid unnecessary
22 litigation of those same issues.

23 I think that should solve all of our
24 concerns.

25 THE ARBITRATOR: Hopefully.

1 MR. JACOBS: Hopefully.

2 THE ARBITRATOR: I note, with regard
3 to the profit withdrawal proceeding, that at
4 least tangentially it relates to some of the
5 good-faith claw-back cases because there's a
6 letter Ms. Chaitman sent on December 8th that
7 said that one of your arguments supports her
8 discovery argument.

9 MR. JACOBS: Right. Well, we can
10 discuss that later if that's ours.

11 MR. HUNT: Sure.

12 THE ARBITRATOR: We'll get to that.
13 I'm not trying to put the cart before the
14 horse.

15 MS. CHAITMAN: Judge, I just want to
16 say one other thing.

17 THE ARBITRATOR: Sure.

18 MS. CHAITMAN: I sympathize with you
19 coming into this case because it's so
20 incredibly complicated. And we've been
21 living with it since 2009.

22 When you asked whether the profit
23 withdrawal was part of the inter-account
24 transfer issue, I just wanted to explain
25 something to you.

1 THE ARBITRATOR: Right.

2 MS. CHAITMAN: If you look at
3 Exhibit B to the complaint which sets out the
4 deposits and withdrawals, in some cases,
5 there's an indication that there's a deposit
6 into the account from another Madoff account.

7 THE ARBITRATOR: Right.

8 MS. CHAITMAN: Now, when we are
9 litigating the net equity of a defendant, we
10 want to look at the transferor account and
11 see whether there were profit withdrawals
12 that the client claims were never received.
13 So --

14 THE ARBITRATOR: And I gather that the
15 CAD -- I forget what the acronym stands
16 for -- that you get includes the paperwork,
17 to the extent the trustee has it, that
18 underlies those transferor accounts.

19 MR. JACOBS: That's correct, your
20 Honor.

21 MS. CHAITMAN: Some of them date back
22 beyond -- they don't have the records.

23 THE ARBITRATOR: Sure. And I gather
24 the Madoff deposition, which I read, really
25 went to the issue of whether some of those

1 purported dividends were real or not. Is
2 that part of what you were exploring?

3 MS. CHAITMAN: Yes, because the
4 trustee has taken the position from inception
5 that Madoff never purchased any securities
6 for his investment advisory customers. And
7 Frank DiPascali, who was Madoff's right-hand
8 man, who was the government's chief witness
9 in the criminal trial --

10 THE ARBITRATOR: He's now dead?

11 MS. CHAITMAN: He died, yes.

12 But he pled in federal court. And in
13 his plea, he started out by saying, early in
14 the 1990s, we started a fraud with respect to
15 the investment advisory --

16 MR. JACOBS: That's not actually what
17 Mr. DePascali said in the proceedings. I
18 would like the record to reflect his actual
19 testimony, not Ms. Chaitman's
20 characterization --

21 THE ARBITRATOR: I'm confident that
22 one of you is right. Why doesn't somebody --
23 and since the trustee seems to have more
24 funding than Ms. Chaitman, why don't you just
25 send me a copy of the guilty plea allocution.

1 MR. JACOBS: I will be happy to.

2 MS. CHAITMAN: And then Mr. Madoff has
3 testified that the fraud began in 1992. So
4 if that's true, if Judge Bernstein finds
5 that, in fact, the fraud began in 1992, then
6 all of the net equity calculations for
7 accounts which predate 1992 would have to be
8 recalculated.

9 THE ARBITRATOR: And the trustee's
10 position, I gather, is that, from inception,
11 Madoff was a Ponzi scheme.

12 MR. JACOBS: To the best of our
13 knowledge, yes, and that the early periods of
14 the fraud are the subject of litigation right
15 now by Ms. Chaitman. The court has
16 authorized a second deposition of Bernard
17 Madoff on that issue.

18 But as it stands now, our position is
19 that the only evidence that that is true is
20 Mr. Madoff's own self-serving statements to
21 that effect, which are not consistent with
22 any of the debtors' books and records.

23 THE ARBITRATOR: Okay. Obviously
24 that's not an issue we're going to resolve.

25 I saw on ECF that one of the Collura

1 reports, and maybe there is only one, is 705
2 pages. I was wondering in relation to all of
3 this whether it makes sense for me to look at
4 the Dubinsky report, some specimen of Collura
5 reports and the Greenblatt report or whether
6 that would be a waste of my time and your
7 money.

8 MR. JACOBS: In terms of your
9 knowledge as context and background --

10 THE ARBITRATOR: Exactly.

11 MR. JACOBS: -- for these and other
12 discovery disputes?

13 THE ARBITRATOR: Yes.

14 MR. JACOBS: We'd be happy to provide
15 a copy of that -- of those reports for you.
16 And perhaps we can choose a representative --

17 MR. HUNT: I think none of the cases
18 that we're talking about today have the
19 Greenblatt and Collura reports yet. So you'd
20 be looking at a report out of context of
21 these cases. It would just be an exemplar of
22 what they do for us.

23 MR. JACOBS: Right.

24 Which in and of itself you may find
25 helpful.

1 THE ARBITRATOR: I assume it basically
2 walks somebody through the Exhibit B; is
3 that --

4 MR. JACOBS: Exhibit B?

5 THE ARBITRATOR: To the complaint.

6 MS. CHAITMAN: Not exactly.

7 THE ARBITRATOR: A typical Collura
8 report?

9 MR. JACOBS: Yes, it does.

10 MS. CHAITMAN: The case-specific ones.

11 MR. JACOBS: The case-specific reports
12 do, yes.

13 THE ARBITRATOR: Is there also an
14 overarching Collura report?

15 MR. JACOBS: There's a component --
16 and this is going to be my crude, potentially
17 not entirely accurate, sort of shorthand of
18 what her report does. But essentially
19 Ms. Collura's report, together with
20 Mr. Greenblatt's report, provide a
21 reconciliation of all of the cash
22 account trans- -- transaction activity at
23 BLMIS from the period for which we have bank
24 statements forward.

25 So essentially what the trustee is

1 doing, your Honor, is -- we have a complete
2 set of third-party bank records from BLMIS's
3 accounts, I believe it's from 1981 or 1982.
4 And we credit all of the customers' account
5 statements for the full amount of their
6 account balance as of that date, and then we
7 start our net equity calculation by comparing
8 what the customer account statements say with
9 independent third-party, usually JPMorgan,
10 financial records.

11 THE ARBITRATOR: So if the account
12 says there's a hundred thousand dollars in it
13 in 1980, you're not challenging that?

14 MR. JACOBS: We give credit to the
15 customer for the full amount of that
16 account -- that statement balance, whether
17 it's fictitious profits or not.

18 What we're saying is that if we can't
19 independently verify it through what our
20 experts do in these reports, then we're not
21 going to challenge it for those early, early,
22 early periods.

23 MS. CHAITMAN: Ted, I think you may
24 have misspoken. Because it's my
25 understanding that you have JPMorgan Chase

1 bank records from December 1988 on and you
2 have Madoff records from 1981.

3 MR. JACOBS: That is correct. Thank
4 you. That is correct. Sorry. I flipped the
5 account statements with the bank statements
6 and that early date.

7 So back to your question, where I
8 was -- where I was going was, together
9 Ms. Collura and Mr. Greenblatt -- what their
10 analysis does is show that the account
11 activity in the customer statements is
12 reliable across the universe of account
13 statements that we have going back, thank
14 you, to the early 1980s because the periods
15 for which we have bank records, when compared
16 to those customer statements, match to a near
17 certainty of close to 100 percent of the
18 time.

19 So their expert analysis is that the
20 cash activity 100 percent or near 100 percent
21 of the time is reliable on the face of
22 Madoff's statements. That's sort of the
23 case-wide function in a nutshell of those
24 reports. And, again, I would like to just
25 reserve the right to let the reports speak

1 for themselves. And I'm not an expert. I'm
2 not as smart as they are. So if I misspoke
3 or made any misstatement or
4 mischaracterization, I apologize in advance.

5 THE ARBITRATOR: Why don't you send me
6 the reports understanding that the Collura
7 reports have not been served in any of the
8 cases that we're talking about currently.
9 And if I begin to look at them and realize
10 I'm going off into an area that I shouldn't
11 worry about, at least now, I'll be glad to
12 abandon reading it.

13 MS. CHAITMAN: Judge, I just want to
14 warn you, the complete set of Collura
15 reports, not case-specific, but the ones that
16 have been produced in the profit withdrawal
17 litigation, are probably six times this
18 binder.

19 THE ARBITRATOR: Just to be clear, I
20 don't want a complete set. I would like a
21 specimen report, understanding that each one
22 may be unique and that --

23 MR. JACOBS: The profit withdrawal
24 reports were geared towards the issues that
25 were in contention. I think the adversary

1 proceeding reports are much smaller,
2 certainly without the exhibits.

3 MS. CHAITMAN: Okay.

4 MR. JACOBS: So I'll take a look. And
5 if it makes sense to exclude exhibits, I can
6 give you a list of what they are.

7 THE ARBITRATOR: Sure.

8 MR. JACOBS: And if you want to have
9 them, we're happy to make whatever you would
10 like.

11 THE ARBITRATOR: Then just in terms of
12 procedure, to the extent I rule today, a
13 number of things could happen.

14 One, I could reduce that to an order.
15 Two, I could say look at the transcript,
16 that's my order. I suppose in some areas, I
17 could issue a more detailed decision. I'm
18 here to try and be user-friendly, so tell me
19 what you think makes sense and maybe for
20 different areas, different results should
21 obtain.

22 MS. CHAITMAN: If I can step in first,
23 your Honor.

24 THE ARBITRATOR: Sure.

25 MS. CHAITMAN: I think, as I

1 understand it, the procedure would be that
2 your decisions, if someone wants to appeal
3 them, would be appealed to Judge Bernstein
4 and then to the District Court.

5 THE ARBITRATOR: Sure. Yep.

6 MS. CHAITMAN: So I think, in that
7 respect, it would be helpful to have an
8 order.

9 Do you disagree with that?

10 MR. JACOBS: We agree that an order
11 would be helpful. And as Ms. Chaitman notes,
12 she has many cases. We'll be, I'm sure,
13 talking about the applicability of those
14 orders in those cases and hopefully working
15 that out.

16 And also we have many hundreds of
17 cases in addition to that with other
18 defendants. So an order gives us an ability
19 to start a good-faith discussion with those
20 defendants to the extent similar issues arise
21 and hopefully resolve them so that they are
22 coming before your Honor.

23 THE ARBITRATOR: And, similarly, I'm
24 in the odd circumstance now where I'm a
25 retired attorney, although I intend to remedy

1 that. But I issued the decision in Crupi and
2 I think my case manager asked that the
3 trustee file it.

4 MR. JACOBS: Yes.

5 THE ARBITRATOR: I looked yesterday
6 and didn't see that it was filed, so I --

7 MR. JACOBS: We are working on that.
8 We will get that filed. We just needed to
9 put together a motion. And I know that's
10 been done, and I'll check with my team and
11 get it filed.

12 THE ARBITRATOR: Okay. So I guess for
13 the time being, to the extent I issue orders,
14 I'll ask the parties to file them. At some
15 point, I'll probably ask Judge Bernstein to
16 have me declared an interested party, which I
17 guess would then permit me to file directly
18 on the NCF.

19 MR. JACOBS: That answers our question
20 as to why you didn't go ahead and file that.
21 We're happy to do it.

22 MS. CHAITMAN: Is that something we
23 can arrange for the judge?

24 MR. JACOBS: I thought we'd just have
25 a simple motion saying, at the request of the

1 arbitrator, we'd like to file this decision
2 in this case, but it's not a case in which
3 you're involved.

4 MS. CHAITMAN: No, but wouldn't the
5 judge -- if he files a notice of appearance,
6 wouldn't he have the right to file a
7 decision?

8 THE ARBITRATOR: But I can't file a
9 notice of appearance for two reasons. One,
10 at the moment, I'm not an attorney. I'm a
11 retired attorney. And I looked at the form,
12 and I have to represent that I'm an attorney
13 in good standing. And I'm not sure whether
14 that representation would be accurate.

15 If neither side objects, maybe what
16 I'll just do is call Judge Bernstein's
17 chambers and see how they suggest I handle
18 that.

19 MR. HUNT: That sounds fine.

20 THE ARBITRATOR: Okay. Then it really
21 falls into the category of minutia, but I see
22 references often to House 5 and House 17. I
23 know it doesn't relate to anything I'm doing
24 currently, but I couldn't resist asking.

25 MR. JACOBS: Okay. House -- it's an

1 easy explanation. These are informal
2 nicknames that BLMIS had for its different
3 operations. House 17 is the investment
4 advisory business that, as you know, the
5 trustee understands was operating a Ponzi
6 scheme. Ms. Chaitman's clients were House 17
7 customers, and that's the investment advisory
8 business.

9 House 5 was the part of BLMIS's
10 business, for lack of a better word, where
11 there was proprietary trading happening and
12 there was a market-making business function.
13 And that the trustee contends is the only
14 portion of the business through which any
15 actual securities trades were conducted at
16 any given point in time.

17 THE ARBITRATOR: And are those the two
18 houses? Is there anything else?

19 MR. JACOBS: That's it. That's
20 essentially it. So if and when you review
21 Mr. Dubinsky's report, you'll see a lengthy
22 discussion about how BLMIS operated as a
23 whole and how those different portions were
24 interrelated, both from a financial
25 perspective and from a fraud and Ponzi scheme

1 perspective.

2 THE ARBITRATOR: Why don't we then
3 turn to the trustee's motion to compel.

4 MR. JACOBS: Sure.

5 THE ARBITRATOR: Unless there were any
6 other housekeeping matters that any of you
7 wanted to bring up.

8 MR. JACOBS: I don't think so, your
9 Honor.

10 THE ARBITRATOR: Ms. Chaitman?

11 MS. CHAITMAN: No.

12 THE ARBITRATOR: Okay. Why don't we
13 deal with the third-party subpoenas to the
14 banks first.

15 MR. JACOBS: I'm not sure that we
16 have --

17 MR. HUNT: None of those are before
18 you right now.

19 THE ARBITRATOR: Oh. I thought that
20 issue was before me, but --

21 MS. CHAITMAN: It is in connection
22 with the responses to some of our
23 interrogatories where we --

24 MR. HUNT: There's no subpoena that's
25 being contested here today.

1 THE ARBITRATOR: Okay. But it does --

2 MS. CHAITMAN: It comes up. It does
3 come up.

4 THE ARBITRATOR: -- deal with the
5 completeness of the responses regarding the
6 accuracy of Exhibit --

7 MR. HUNT: I think it comes up
8 tangentially in that regard.

9 THE ARBITRATOR: Well, rather than me
10 then guiding the discussion, why don't you
11 tell me in relation to that motion what the
12 trustee wants to talk about first.

13 MR. HUNT: So there are actually three
14 cases where we filed a motion to compel --

15 THE ARBITRATOR: Right.

16 MR. HUNT: -- the Train Klan case, the
17 DiGiulian case and the Benjamin case.

18 As I'm sure you're aware, having
19 reviewed our pleadings, there are a lot of
20 very similar issues here. Specifically the
21 defendants assert a number of affirmative
22 defenses, which they bear -- bear the burden
23 of proving, of course, in which they have
24 chosen to just deny us discovery about in its
25 entirety.

1 Second of all, while the defendants on
2 the one hand say they don't dispute
3 Exhibit B, they spend a large amount of time
4 in their answers explaining why Exhibit B is
5 not accurate and why the records that we have
6 are not admissible and why we can't prove our
7 case. So we clearly have the right to take
8 discovery on those issues.

9 So what I thought might make some
10 sense is to just talk through the discovery
11 responses themselves, starting with Train
12 Klan, which is the most complicated one. And
13 I think by the time we get to Benjamin, we
14 will be starting to repeat ourselves a bit.

15 THE ARBITRATOR: Well, I'm sure it's
16 right that there's overlap and that we'll all
17 be repeating ourselves. One of the things I
18 guess I began to have a feel for what you've
19 all been struggling with is, obviously there
20 were boilerplate responses to your requests.
21 And that worked both ways. And clearly some
22 word processing errors also --

23 MR. HUNT: I agree with that.

24 THE ARBITRATOR: -- on both sides.

25 But, sure. Train Klan, you've asked

1 for a lot of partnership material. Judge
2 Bernstein dismissed the claims against
3 subsequent transferors in a number of these
4 claw-back cases --

5 MS. CHAITMAN: Transferees.

6 THE ARBITRATOR: Transferees. Excuse
7 me.

8 -- saying that there was insufficient
9 information pled. General partners of a
10 limited partnership are treated as alter egos
11 of the partner, but limited partners, as I
12 understand the law, are not. You seem to be
13 asking for information as to both.

14 MR. HUNT: We're asking for
15 information about the partners. With respect
16 to Train Klan, all they say is there are
17 partners. Of course, the partnership
18 documents and percent ownership interest and
19 type of partner is all relevant exactly for
20 the reason you said.

21 Moreover --

22 THE ARBITRATOR: Why is anything --
23 and it may be that you end up with the same
24 documents, but if my order in that area were
25 to be that Ms. Chaitman's client, Train

1 Klan -- I guess it's really two defendants
2 with the Train Klan partnership -- must
3 produce documents to show -- sufficient to
4 show you over time who the general partners
5 were.

6 Why doesn't that satisfy your need,
7 yet respond to Ms. Chaitman's concern?

8 MR. HUNT: We don't know even what
9 type of entity Train Klan is. It says it's a
10 partnership. We don't know if it's a general
11 partnership, a limited partnership or what
12 kind of entity it is.

13 So what we're seeking is the legal
14 name of the partnership, the type of entity
15 it is, the basic information about that
16 entity, when it was established, whether it
17 was formed out of a predecessor entity, which
18 state or country it's incorporated in or
19 where it's --

20 THE ARBITRATOR: By definition,
21 probably it's not incorporated.

22 MR. HUNT: Well, yes.

23 Which state or country was it formed.
24 What law applies they think. And the names
25 and addresses of the current and former

1 partners, members, whatever that may be, and
2 their ownership interest in that partnership.

3 That establishes the liability of the
4 partners, I think. We don't have any of that
5 information. And I'm not sure that a --

6 THE ARBITRATOR: Let's say, for
7 argument's sake, you're a 10 percent limited
8 partner and I'm a 5 percent limited partner
9 and the court reporter is the general
10 partner. Once you establish that the court
11 reporter, Ms. Mulvenna, is the general
12 partner, putting aside the other materials
13 around that that you're interested in, why
14 does it matter whether I have 5 percent and
15 you have 10 percent or vice versa or who the
16 other limited partners may be?

17 MR. HUNT: We don't know, first of
18 all, if there are any limited partners. But
19 second of all, depending upon how this entity
20 is set up, each of those individuals may be
21 liable for their percentage share as a direct
22 transferee depending on how the proceeds are
23 distributed. We don't know because they
24 won't tell us.

25 THE ARBITRATOR: Ms. Chaitman.

1 MS. CHAITMAN: Well, you know, we have
2 a tension here because, as you've recognized,
3 Judge Bernstein held that the complaints
4 against the subsequent transferees failed to
5 state a claim. And we have cases from United
6 States Supreme Court on down saying you can't
7 take discovery in order to obtain the facts
8 you need to file a complaint.

9 And, indeed, the trustee has used
10 those cases against me when I've sought to
11 take discovery in order to get the facts
12 which would allow me to state a claim.

13 So I don't think that the trustee can
14 argue that that line of cases does not apply
15 here. And what I've tried to do is protect
16 my clients, as I believe I'm entitled to, by
17 not disclosing anything which would give the
18 trustee the precise information he's seeking
19 because he wants to be able to name the
20 individuals.

21 And if I have to disclose how much
22 each person has, he's going to then sue them
23 for that percentage of the withdrawals. And
24 I think that I'm entitled to -- he's entitled
25 to get a judgment against the account holder.

1 And if the account -- if the judgment isn't
2 paid, then he can sue the individual
3 partners. But that's the order that the
4 United States Supreme Court has established.
5 And I don't think that he should be entitled
6 to circumvent that.

7 THE ARBITRATOR: One of my problems is
8 I think I agree with both of you. And I also
9 think, as a general operating principle, that
10 if either side is entitled to discovery for
11 Reason A, the fact that it may also be
12 helpful as to undisclosed Reason B is not a
13 basis to turn down a request for discovery.

14 But specifically with respect to Train
15 Klan, I think what I'm going to require be
16 produced are any partnership agreements. And
17 in doing that, I note that -- I think it was
18 Cravath Swain & Moore operated for many years
19 with no written partnership agreement. So
20 I'm mindful that perhaps there are no
21 partnership agreements or not ones of the
22 formality that we're used to.

23 But any partnership agreements for the
24 relevant time period. And I guess that will
25 then lead to a discussion of what the

1 relevant time period is. It may be from
2 formation. And as I said, documents
3 sufficient to show who the general partner,
4 or partners, over time of the partnership
5 are.

6 MR. HUNT: The relevant time period is
7 1993 forward.

8 THE ARBITRATOR: Okay. Just so I
9 understand, explain to me why --

10 MR. HUNT: That's when the account was
11 opened, in May of 1993.

12 THE ARBITRATOR: Okay. So whatever
13 partnership agreement existed then. If the
14 partnership was formed in 1970, which is
15 unlikely, you wouldn't have to produce that
16 partnership agreement unless it was the
17 operative agreement in 1993.

18 MS. CHAITMAN: But the trustee's only
19 permitted to sue to recover withdrawals taken
20 within the last two years prior to Madoff's
21 confession. So why would partnership
22 agreements that predate December 11, 2006,
23 have any relevance?

24 THE ARBITRATOR: Well, I think that
25 the trustee is entitled to know how the

1 partnership was organized. And as I
2 understand Judge Bernstein's rulings,
3 although maybe here I'm going beyond my role,
4 and the case law, it doesn't appear that the
5 trustee has a basis at the moment pursuing a
6 limited partner. But the trustee may have a
7 different view of that.

8 MR. HUNT: So just to be clear, in
9 this particular case, we've sued the partners
10 who we know of.

11 THE ARBITRATOR: You've sued the whole
12 group of people; correct?

13 MR. HUNT: Which we assume are general
14 partners based on what information we have.

15 THE ARBITRATOR: But assuming there's
16 a formal partnership agreement and that one
17 of those defendants is the general partner
18 and others are limited partners, I'm not sure
19 that under the case law and Judge Bernstein's
20 rulings, that there's a basis for suing the
21 limited partners.

22 MR. HUNT: Right. But she has to give
23 us the information showing they're limited
24 partners before we can talk about that.

25 THE ARBITRATOR: She has to give you

1 the information showing you, under my ruling,
2 who the -- or the documents showing you who
3 the general partner is. That document may
4 also show you who the limited partners are.
5 But documents can't be redacted, as far as
6 I'm concerned, on the basis of relevance.

7 So it may, through the back door, give
8 you information about percentages of who the
9 limited partners are. But my understanding
10 of the case law is that the general partner
11 is not considered a subsequent transferee
12 because the general partner is, in effect,
13 the alter ego of the partnership.

14 MR. HUNT: I agree with that. In this
15 particular case, we have sued each of the
16 partners in their capacity as a partner.

17 THE ARBITRATOR: Right.

18 MR. HUNT: So if Ms. Chaitman wants to
19 get them dismissed from the case, she has to
20 prove to us that they're limited partners.
21 We can't take it at -- her at her word. If
22 she wants them out, she has to tell us why
23 she wants them out, I would say.

24 THE ARBITRATOR: I'm going to adhere
25 to my ruling. Why don't you wait and see

1 what documents you get in response to that
2 ruling. Maybe it will become a non-issue.
3 If it still is a concern, we can deal with it
4 on a more granular level.

5 MR. HUNT: Okay. The other thing too,
6 just to be clear, your ruling has to do with
7 documents, but I would like them also to
8 answer the interrogatories relating to those
9 points. So we don't have to go through the
10 documents and figure out what the answer
11 might be.

12 THE ARBITRATOR: Let's deal with
13 specific interrogatories so that we have a
14 somewhat definitive answer.

15 MR. HUNT: That sounds great. Thank
16 you.

17 So we received two responses to
18 interrogatories in Train Klan.

19 THE ARBITRATOR: One on behalf of the
20 partnership, one on behalf of the
21 individuals.

22 MR. HUNT: Right. And with respect to
23 the individuals, I have an issue with that.
24 Because Ms. Londa signed with power of
25 attorney as a partner for each of the

1 individuals. We never did get a response
2 from the individuals.

3 So I would like -- if the court -- if
4 your Honor would help us with that. I'd like
5 to get actual answers from each of the
6 defendants rather than someone signing with
7 power of attorney for all of them.

8 THE ARBITRATOR: Well, what I'm
9 inclined to do -- and if schedule were not an
10 issue, let me tell you what I'd be inclined
11 to do. And although I understand all of
12 these cases have their own schedules, there
13 must be some sort of overarching view of how
14 these cases will ultimately get resolved.
15 And that big picture view I express complete
16 ignorance as to.

17 But if scheduling were not an issue,
18 what I would be inclined to do is say the
19 partnership should respond. And then,
20 depending upon that, it may be unnecessary
21 for the individuals to respond depending on
22 the documents and interrogatory responses you
23 receive.

24 Maybe there's some belt and suspenders
25 approach you'd want down the road. I could

1 see certifications from each of the
2 individuals that they've never -- who are not
3 general partners, that they've never been a
4 general partner.

5 But I'm not unsympathetic to what
6 Ms. Chaitman says about the extent of their
7 limited partnership interest being none of
8 the trustee's business assuming that they
9 were only limited partners --

10 MR. HUNT: Assuming that it's even a
11 partnership.

12 THE ARBITRATOR: -- and that it's a
13 partnership that observed formalities rather
14 than the equivalent of an investment club of
15 people who get together once a week and
16 say --

17 MR. HUNT: Right. I mean, that's what
18 we're finding some of these things are. And
19 so it may not even be a partnership as far as
20 we know.

21 THE ARBITRATOR: So let me get back to
22 what I was asking, which is, to the extent I
23 make rulings like the one I just described,
24 what impact does it have on that broad
25 schedule of how these cases march their way

1 toward resolution?

2 MR. HUNT: For Train Klan
3 specifically? Because that is --

4 THE ARBITRATOR: Why don't we stick
5 with that, yes.

6 MR. HUNT: So I think what that does
7 is it sort of makes it a two-step process.
8 Because based upon what we learned from this
9 sort of intermediate response, we still may
10 have questions that we need to address and
11 we'll have to come back to you.

12 THE ARBITRATOR: But I guess what I'm
13 inarticulately trying to ask is, am I
14 screwing up Judge Bernstein's schedule by
15 doing that?

16 MR. HUNT: No. One of the things --
17 I'll tell you this, we can't agree on much,
18 but we can agree on scheduling issues. And
19 the parties have the flexibility to move the
20 schedule around to meet their needs. So to
21 the extent there's a scheduling issue, I'm
22 certain that Ms. Chaitman will accommodate
23 additional scheduling time to resolve it.
24 She has in the past.

25 MS. CHAITMAN: And I'm sure you've

1 seen there are so many issues, we haven't
2 gotten discovery on two. And obviously we're
3 going to need to extend the discovery.

4 THE ARBITRATOR: Okay. And Judge
5 Bernstein is, to use the vernacular, cool
6 with that?

7 MR. HUNT: Yes, sir.

8 MR. JACOBS: If by agreement of the
9 parties, it's never been an issue.

10 THE ARBITRATOR: Okay. Great.
11 So as to the partnership, I ruled with
12 respect to --

13 MR. HUNT: I'm sorry I interrupted
14 you.

15 THE ARBITRATOR: I was going to say
16 what you just volunteered. Let me find --

17 MR. HUNT: You're smart enough to copy
18 yours double-sided.

19 THE ARBITRATOR: No, you sent this to
20 me so --

21 MR. HUNT: We're smart enough to do it
22 for you.

23 THE ARBITRATOR: Except I'm looking at
24 the wrong --

25 MR. HUNT: It's Interrogatory No. 1 to

1 the -- the answers to the interrogatories
2 sent by Train Klan are identical to the ones
3 that we received from the individuals signed
4 by Ms. Londa on behalf of the individuals.

5 THE ARBITRATOR: So it's
6 Interrogatory 1 --

7 MR. HUNT: The response we got was
8 that this information is not relevant. And I
9 think you've already ruled that, to the
10 extent that these -- first of all, we need to
11 know if it's a partnership, what kind of
12 partnership it is, and who the partners are.
13 Looks like the only thing you were
14 withholding or that we could think you'd
15 potentially withhold is the percent
16 beneficial interest to the account.

17 THE ARBITRATOR: Well, I would modify
18 it -- after the words "the names and
19 addresses of its current and former," I would
20 insert the word "general partners" and cross
21 out everything up to "its current and former
22 business addresses and current and former
23 principal places of business."

24 And since I was ruling with respect to
25 documents, conceivably Ms. Chaitman could

1 answer that by saying, see documents Bates
2 Nos. 1 through whatever.

3 MR. HUNT: I would agree with that.

4 THE ARBITRATOR: Okay.

5 MR. HUNT: And then Interrogatory
6 No. 2 also relates to that. We asked them
7 for the dates and amounts of any transfers
8 received by the partnership, whether the
9 person was a partner, and state whether that
10 person received any portion of the transfers.
11 They respond by telling us who the partners
12 are.

13 MS. CHAITMAN: Again, I think that
14 that's precisely -- that runs afoul of the
15 mandate from the Supreme Court on down that
16 they're seeking discovery to frame a
17 complaint against a subsequent transferee.

18 MR. HUNT: I can tell you one thing is
19 certain -- and we've been accused about this
20 repeatedly, and it's not true, and that is
21 that we're using this discovery to form a
22 complaint against someone else. That is not
23 true.

24 What we're trying to do is find out
25 where the money went so we can trace it, and

1 that's all we're trying to do.

2 THE ARBITRATOR: But as I understand
3 case law regarding pleading and the case law
4 that relates to who in a partnership is
5 liable for the debts, and I'm using that in
6 the generic way of the partnership, it's the
7 general partner only. So I'm inclined to
8 reserve decision on Interrogatory No. 2.
9 Let's wait and see what happens with respect
10 to Interrogatory No. 1.

11 It may be that, at a later date, I
12 grant that request or other requests relating
13 to transfers, but I think we need to see if
14 there is a real partnership.

15 MR. HUNT: I agree with you.

16 THE ARBITRATOR: If it's got a binder
17 of documents reflecting meetings of the
18 partnership and the like, it's a very
19 different animal than if it's an investment
20 club.

21 MR. HUNT: I agree with you. I think
22 that's a great resolution of that
23 Interrogatory No. 2.

24 THE ARBITRATOR: Okay.

25 MR. HUNT: Interrogatory No. 3 we

1 asked for reasons for each transfer. And
2 they simply say they're not able to do so.
3 Someone, the general partner or someone,
4 requested this transfer and we want to know
5 why and what was the intent of the use of the
6 money.

7 THE ARBITRATOR: Well, again, let's
8 see who the general partner is because I
9 probably -- assuming there is a general
10 partner, that it has some formality, I
11 probably would require the general partner to
12 answer that question, but not the other
13 partners. So --

14 MS. CHAITMAN: Why would that be
15 anything other than discovery to frame a
16 complaint?

17 THE ARBITRATOR: Well --

18 MS. CHAITMAN: Because, again, if the
19 account -- we're not disputing that the
20 account holder took the money. So now you're
21 going to the next generation of transfers.

22 THE ARBITRATOR: Well, I don't know
23 which defenses you asserted with respect to
24 partnership, but potentially it could impact
25 some of your affirmative defenses. But to be

1 clear, I'm not ruling that that is the way I
2 would rule.

3 MR. HUNT: I'm comfortable with you
4 deferring a ruling on that pending obtaining
5 some additional documents and information
6 about this entity, whatever it is.

7 THE ARBITRATOR: Train Klan also
8 raises the question -- and I'm jumping ahead
9 and perhaps out of the order -- the trustee
10 wanted to raise issues, but there's -- in
11 response to "Identify each deposit into the
12 account" is the answer "Responding parties do
13 not dispute the deposits and withdrawals
14 shown on Exhibit B," but then there's the
15 caveat about "The records are permeated with
16 fraud, no records exists before 1998, so
17 trustee has no competent evidence of any
18 activity in the account prior to
19 December 1998," although this speaks to what
20 I was talking about about boilerplate used by
21 both sides.

22 As I understand what I was told, this
23 account didn't exist before 2003, so it
24 doesn't much matter what happened in 1998.
25 But let me not jump ahead and --

1 MR. HUNT: I think that's exactly the
2 next place I was going as well, was
3 Interrogatory No. 5.

4 THE ARBITRATOR: Okay.

5 MR. HUNT: You know -- and this is
6 sort of something we see across all of these
7 responses, which is, they say they don't
8 dispute, whatever that means, the deposits
9 and withdrawals shown on Exhibit B. It seems
10 like what they're not disputing is that the
11 numbers appear on the page.

12 Because then they go on to say there
13 are all these problems with the numbers and
14 they have affirmative defenses that say we
15 can't prove the deposits and withdrawals. So
16 anytime you see an answer that's supposed to
17 be some kind of an admission followed by the
18 word "however" and then followed by the word
19 "moreover," it's not.

20 And so we have the right to ask them
21 to identify each deposit into the account so
22 that we can figure out if they do actually
23 dispute any of them.

24 THE ARBITRATOR: Well, what I find
25 particularly confusing, Ms. Chaitman, is, as

1 to bank records -- third-party bank records,
2 in some of these answers, although that may
3 be moot now, you've said, you're not entitled
4 to it because we don't dispute the deposits
5 and withdrawals on Exhibit B, but then the
6 20th affirmative defense says, "The trustee
7 has fraudulently calculated defendants'
8 liability." It's hard to square those two
9 responses.

10 MS. CHAITMAN: Well, I have offered
11 to -- when we concede the accuracy of the
12 deposits and withdrawals, we're agreeing that
13 Exhibit B is accurate. And that obviously --
14 I'm volunteering that, and obviously that can
15 be enforced against my clients, there's no
16 question about that.

17 However, when we go to trial, the
18 trustee may try to rely upon records of
19 Madoff beyond Exhibit B. All I'm conceding
20 is that Exhibit B is accurate. I'm not
21 conceding that Madoff's records are accurate.
22 In fact, Picard's own expert has said that
23 Madoff's records are permeated with fraud.

24 So I'm simply reserving the right to
25 object to other records. I'm not contesting

1 the accuracy of Exhibit B.

2 MR. HUNT: That's not accurate.

3 THE ARBITRATOR: Pull up Exhibit B. I
4 don't have the Train Klan --

5 MR. HUNT: I've got it right here.

6 THE ARBITRATOR: But I've -- really
7 for these purposes, it's only the columns.
8 There were a number of ways in which one
9 could interpret your response, one of which
10 is, for the two-year period at issue, we
11 don't dispute the deposits and withdrawals.

12 Another is that we don't dispute
13 Columns 1 through 10, which takes you through
14 the two-year fraudulent transfer calculation.
15 As I understand it, the six-year fraudulent
16 conveyance calculation is basically
17 irrelevant --

18 MR. HUNT: That's correct.

19 THE ARBITRATOR: -- as to everybody
20 we're going to be talking about today.

21 MR. HUNT: That's correct.

22 THE ARBITRATOR: So is it that you're
23 agreeing with Columns 1 through 10?

24 MS. CHAITMAN: We're agreeing with the
25 deposits and withdrawals, which are Column 4

1 and 5.

2 THE ARBITRATOR: Right. Another way
3 of saying that is you're agreeing with the
4 net equity calculation; is that --

5 MS. CHAITMAN: Well, we're agreeing --
6 we contest the --

7 THE ARBITRATOR: Column 5 gives you at
8 the bottom a net equity number.

9 MS. CHAITMAN: Right. We're agreeing
10 with -- we're agreeing that the cash deposits
11 are accurately reflected in Column 4 and the
12 cash withdrawals are accurately reflected in
13 Column 5.

14 We're not agreeing -- we're not
15 agreeing as to the trustee's calculation of
16 principal because we don't agree that in
17 the -- in these cases, the trustee is allowed
18 to recover.

19 THE ARBITRATOR: Okay.

20 MS. CHAITMAN: So -- you know, that's
21 why I tried to be very specific. We're
22 agreeing to the deposits and withdrawals.

23 THE ARBITRATOR: Just to be clear,
24 using Train Klan, it shows a negative number
25 of \$1,442,181 because more money was taken

1 out than was put in.

2 MS. CHAITMAN: Correct.

3 THE ARBITRATOR: And you're not
4 disputing that.

5 MS. CHAITMAN: The math, correct. Or
6 the deposits and withdrawals.

7 But, again, I have the reservation
8 because there are a lot of other books and
9 records that may become relevant. And I
10 don't want to come to trial and find out that
11 I've conceded the accuracy of all of Madoff's
12 records, because I haven't.

13 THE ARBITRATOR: Well -- and by
14 agreeing with 4 and 5, you're also agreeing
15 with 1 through 3, the dates and --

16 MS. CHAITMAN: Well, yes. But in this
17 particular instance, we are, but in some,
18 there are inter-account transfers. And it
19 becomes much more complicated at that point.

20 THE ARBITRATOR: Sure. Let's deal
21 with the purist case first, like Train Klan,
22 where there are no inter-account transfers.

23 My thought was that rather than
24 getting mired in the interrogatory responses,
25 that this is better handled under the other

1 alternative that Judge Bernstein suggested at
2 one of his conferences, which is a
3 stipulation.

4 MS. CHAITMAN: I recall that. I think
5 that's a good idea. We had no problem with
6 that.

7 THE ARBITRATOR: So -- so the
8 stipulation would be that the defendant in
9 question does not dispute the accuracy or
10 completeness of the information in Columns 1
11 through 5 of Exhibit B of the relevant
12 complaint.

13 MS. CHAITMAN: Well, the easier way to
14 do it I think is 4 and 5. Because I have
15 to -- in this case, we can do that, but where
16 there are inter-account transfers, we can't.

17 THE ARBITRATOR: And I'm just trying
18 to deal with the pure case.

19 MS. CHAITMAN: In this case, we can do
20 that.

21 THE ARBITRATOR: The reason I said 1
22 through 5 is because it's also relevant what
23 the two-year look-back period is. So the
24 dates are important; correct?

25 MS. CHAITMAN: Right.

1 THE ARBITRATOR: So you don't have a
2 problem with what I just said --

3 MS. CHAITMAN: That's what --

4 THE ARBITRATOR: -- in actions where
5 there are no complicating factors, whether
6 it's inter-account transfers or -- I know one
7 of the defendants said, I was not being
8 credited or I was being charged with two
9 \$25,000 -- I can't remember if it was deposit
10 or withdrawal, it was probably withdrawal --
11 that was double counted. Obviously there may
12 be glitches like that. But for somebody who
13 doesn't have inter-account transfers, that
14 stipulation works?

15 MS. CHAITMAN: Yes.

16 THE ARBITRATOR: Okay. It seems to me
17 that that eliminates a lot of the concerns
18 about the interrogatory responses.

19 MR. HUNT: Yes. So I think what that
20 means then is that, you know --

21 THE ARBITRATOR: And let me modify
22 what I just said on the fly and say it should
23 have the words in there "at trial." So at
24 trial, the defendant will not challenge what
25 I had said earlier.

1 MR. HUNT: I would agree with that.

2 And what that effectively means then
3 is that she would be withdrawing, for
4 example, the 20th affirmative defense.

5 MS. CHAITMAN: What's the 20th
6 affirmative defense?

7 MR. HUNT: "Trustee has fraudulently
8 calculated defendants' liability by charging
9 defendants with withdrawals that the trustee
10 has no proof were taken."

11 MS. CHAITMAN: In this case, I would,
12 yes.

13 THE ARBITRATOR: Well, in any case
14 where --

15 MS. CHAITMAN: Where I stipulate.

16 THE ARBITRATOR: -- you enter into
17 that stipulation, the 20th defense takes a
18 nose dive.

19 MS. CHAITMAN: Right.

20 MR. HUNT: Okay.

21 THE ARBITRATOR: And I think that
22 obviates problems. It also -- even if there
23 were inconsistent interrogatory responses or
24 affirmative defenses, they go out the window
25 because the stipulation controls.

1 MR. HUNT: Right.

2 So just to be clear then, that
3 stipulation is now on the record here. So
4 we're not going to spend time drafting
5 something with her. Because we've tried this
6 for a long time in the past.

7 THE ARBITRATOR: Well, once we get the
8 transcript of this, and I'd ask that the
9 trustee have it expedited, my order will say
10 what I just said, with the modification that
11 I just described. If either side thinks it
12 needs more or fewer words, you can let me
13 know that in a few days.

14 And I may or may not modify my order,
15 but ultimately there will be an order saying,
16 if Ms. Chaitman's clients stipulate to X,
17 they need not modify particular interrogatory
18 responses.

19 MR. HUNT: Okay.

20 THE ARBITRATOR: And -- and while
21 we're talking about that, to the extent that
22 her interrogatory responses or the
23 stipulation withdraw particular affirmative
24 defenses, I'm not sure much is accomplished
25 by requiring Ms. Chaitman to file an amended

1 answer.

2 MR. HUNT: I agree. I think what I'd
3 like to do is get it on the record that
4 they're withdrawn. Because you can withdraw
5 them and you can always reinstate them, but
6 if there's an order and agreement they're not
7 going to --

8 THE ARBITRATOR: If there's a
9 stipulation --

10 MR. HUNT: I agree.

11 MS. CHAITMAN: If it's a stipulation
12 as to certain facts. I think we have to be
13 careful because we do -- again, this is -- if
14 we're specifically talking about Train Klan,
15 it's fine, but there are issues about
16 fraudulent calculations that are earlier in
17 time.

18 So we're not going to -- I may
19 stipulate in a case, but I'm not going to
20 withdraw some of the affirmative defenses.
21 In other words, obviously if we stipulate
22 that the deposits and withdrawals were made,
23 that's binding. But that doesn't mean
24 that --

25 THE ARBITRATOR: Let's take two cases,

1 one in which there are pre -- what was it,
2 1998?

3 MS. CHAITMAN: December 1998 is when
4 we have third-party bank records.

5 THE ARBITRATOR: So one in which there
6 are records going back to the early '80s or
7 Exhibit B reflects information going back to
8 the early '80s. The second scenario, an
9 account with inter-account transfers. Let's
10 deal with the second of those first.

11 I suppose -- well -- and they may be
12 the same issue because it may be that the
13 transferor account predates the time period
14 where you have -- where there are records and
15 that gives rise to the concerns. But I think
16 we're all in agreement that in cases where
17 the stipulation is entered into, that solves
18 the problem.

19 So let me turn to you, Ms. Chaitman,
20 and say, where have you said, if anywhere,
21 you don't dispute Exhibit B, but you still
22 want to rely on the "however" and "moreover"
23 language?

24 MS. CHAITMAN: Well, as you can
25 appreciate, Judge, some of these accounts

1 date back to 1980.

2 THE ARBITRATOR: Right.

3 MS. CHAITMAN: And nobody has the
4 records, nobody has a recollection, the
5 people who owned the accounts may not be
6 alive. So -- and the trustee's position is
7 that the fraud existed from inception and
8 that the records are permeated with fraud.

9 And in fact, we've made a motion now
10 before Judge Bernstein in the profit
11 withdrawal litigation barring the admission
12 of Madoff's books and records because they
13 don't come with any of the business record
14 exceptions.

15 THE ARBITRATOR: I guess the trustee's
16 position is that the records accurately
17 reflect a fraud. So to the extent that
18 there's language about permeated with or -- I
19 know there was parallel language, perhaps,
20 but they're arguing that all the trading from
21 the beginning of time was fictitious.

22 You're contending that, based on
23 Madoff and his colleague, some of the trading
24 may have been real and that, therefore, the
25 Ponzi presumption doesn't apply to the later

1 date.

2 Are there cases in which, because of
3 the age of the relationship with Madoff's
4 business or because of inter-account
5 transfers, you have the language that you
6 don't dispute the deposits and withdrawals on
7 Exhibit B, but are still contesting the
8 admissibility of the records?

9 MS. CHAITMAN: Yes. We -- we contest
10 the admissibility of Madoff's records for any
11 period when there aren't third-party bank
12 records. And --

13 THE ARBITRATOR: So that's 1998
14 backward?

15 MS. CHAITMAN: December 1998, yes.

16 And there may be instances where we
17 would concede the accuracy of Exhibit B from
18 a certain point on, but not before. So I
19 think it would be -- it would be difficult
20 for me to agree that, in every instance in
21 which I can stipulate as to certain deposits
22 and withdrawals, I can also stipulate that
23 the affirmative defense that the records are
24 fraudulent is taken out. I can't do that
25 because I -- I think that Madoff's records

1 will not be admitted. I think they are not
2 admissible.

3 THE ARBITRATOR: Once you stipulate to
4 it --

5 MS. CHAITMAN: But only for a certain
6 period. I'm not stipulating for the whole
7 period. In other words, we can take it case
8 by case, but --

9 THE ARBITRATOR: If we look at the two
10 other defendants that are part of the
11 trustee's motion, does that shed light on
12 this?

13 MS. CHAITMAN: No, because in these
14 three cases, we have conceded the accuracy of
15 Exhibit B from inception.

16 THE ARBITRATOR: Okay. I'm open to
17 suggestions as to how to proceed.

18 MR. HUNT: Yeah, I hear exactly what
19 you're saying.

20 So just to be clear then, on Train
21 Klan, taking it one at a time, the defendants
22 are going to stipulate that all of the
23 transactions that are listed in Exhibit B,
24 Columns 1 through 5, accurately reflect the
25 transactions that took place in this account.

1 THE ARBITRATOR: And will not be
2 contested at trial.

3 MR. HUNT: And so with respect to
4 Interrogatory No. 5 then, we asked them to
5 identify each deposit. And by that we also
6 need to know who received the deposit. So
7 Exhibit B by itself does not answer that
8 question.

9 So I'd like at least an answer as to
10 whether or not the deposit was given to Train
11 Klan or not; right?

12 THE ARBITRATOR: Well, deposits --

13 MR. HUNT: Or the withdrawals. Sorry.
14 The deposit's been made by Train Klan. So
15 for each deposit, did Train Klan make the
16 deposit? And then, similarly, with respect
17 to each withdrawal, who got the withdrawal,
18 if Train Klan got the withdrawal.

19 MS. CHAITMAN: Well, you see, that's
20 exactly the subsequent transferee discovery
21 that the trustee is not permitted to take.

22 MR. HUNT: We need to know --

23 MS. CHAITMAN: You can't --

24 MR. HUNT: We have a right to know
25 who -- if the -- who the initial transferee

1 is. We have a right to know that.

2 MS. CHAITMAN: The initial transferee
3 is the account holder.

4 THE ARBITRATOR: I was about to say
5 maybe the stipulation needs some
6 supplementation to say, and does not dispute
7 that the account holder received the
8 withdrawal reflected in Column 5. That may,
9 in a particular circumstance, be inaccurate.
10 It may be that, rather than somebody getting
11 a check payable to themselves, it was to
12 their Bar Mitzvah caterer, but it solves your
13 problem and eliminates the need to respond to
14 that interrogatory.

15 MR. HUNT: I agree with that.

16 THE ARBITRATOR: Does that work for
17 you?

18 MS. CHAITMAN: You're asking us to
19 stipulate that the money was deposited into
20 the account holder's account?

21 THE ARBITRATOR: Or that you're not
22 disputing -- at trial, you will not dispute
23 that that's the fact.

24 MS. CHAITMAN: So the money was
25 deposited into the account holder's account.

1 Yes, I have no problem with that.

2 I don't think that that's what Dean
3 was driving at. I think he's asking --

4 Dean, correct me if I'm
5 misunderstanding you. I thought you wanted
6 to know, once it went into the account
7 holder's account, where did it go from there?

8 MR. HUNT: I need to know who got the
9 initial transfer. That's all we need to
10 know. So if it is true that each withdrawal
11 was deposited into Train Klan's bank account,
12 then that's what the stipulation should say.
13 If the -- if it was deposited into some other
14 account, we need to know that.

15 MS. CHAITMAN: And why would that --
16 why would you be -- see, again, let's
17 assume -- and I don't know the fact. Let's
18 assume that it was deposited into one of the
19 partners' accounts. That partner then would
20 be a subsequent transferee. Why would --

21 THE ARBITRATOR: No, not if it's a
22 general partner.

23 MS. CHAITMAN: Okay.

24 THE ARBITRATOR: But it really doesn't
25 matter to my mind, dealing with Train Klan

1 specifically, whether the check was cut to
2 the partnership, to the general partner or
3 even to a limited partner, who the trustee
4 might view as a subsequent transferor.

5 In any of those circumstances, the
6 partnership and the general partner are on
7 the hook for whatever the legal consequences
8 of the transaction are.

9 MR. HUNT: Assuming it's a
10 partnership.

11 THE ARBITRATOR: Assuming it's a
12 partnership, yes.

13 So maybe -- maybe we have to see how
14 many of the cases this resolution solves the
15 problem for.

16 Do you have any sense, Ms. Chaitman,
17 as to how many of your cases involve
18 transferor accounts where money's transferred
19 from Account A to Account B as part of the
20 Exhibit B calculation?

21 MS. CHAITMAN: Well, I'm not following
22 you. Because each account holder had a bank
23 account and --

24 THE ARBITRATOR: I'm not talking about
25 bank accounts. I'm talking about the

1 Madoff -- well, let me phrase it a different
2 way.

3 Do you know how many of the Exhibit Bs
4 in terms of deposits implicate earlier
5 accounts which are transferor accounts and,
6 therefore, to your mind, complicate the
7 accounting and what you can stipulate to?

8 MR. JACOBS: I think, your Honor,
9 you're referring to inter-account transfers.

10 THE ARBITRATOR: Yes.

11 MR. JACOBS: So how many cases
12 implicated inter-account transfers?

13 THE ARBITRATOR: Yes.

14 MS. CHAITMAN: I haven't counted them,
15 but a lot.

16 MR. JACOBS: I haven't counted either,
17 but there's a good portion. I would say at
18 least roughly half.

19 THE ARBITRATOR: Okay.

20 MS. CHAITMAN: But not -- I don't
21 believe any of the three that we're talking
22 about; Benjamin, DiGiulian or Train Klan.

23 THE ARBITRATOR: Right. Well, I guess
24 then the question is, even though it's not
25 before me today, should we deal with what, if

1 anything, can be stipulated to with regard to
2 those other accounts? I'm content to leave
3 that for another day. You tell me.

4 MS. CHAITMAN: You know, Judge, we
5 have so many things before us. And I just
6 think we'd be doing it in the abstract.

7 THE ARBITRATOR: Okay.

8 MR. JACOBS: Our position, your Honor,
9 is we provided voluminous documentation as to
10 all of our claims, whether there are bank
11 records or not. And many of the factual
12 issues are in, uniquely, the possession of
13 the defendants.

14 And no matter what period of time
15 they're from, the defendants have an
16 obligation to have preserved those records
17 when they were on notice of the litigation.
18 And they have an obligation to do their own
19 investigation as to the factual circumstances
20 of our Exhibit B, regardless of the period of
21 time.

22 And they should be required to answer
23 our discovery as to their position as to each
24 deposit and withdrawal and our net equity
25 calculation whether there was an

1 inter-account transfer or not.

2 THE ARBITRATOR: But it's not before
3 me today, so let's move on to whatever it is
4 Mr. Hunt next wants to talk about.

5 MR. JACOBS: Okay.

6 MR. HUNT: I think we have
7 Interrogatory No. 5 pretty well nailed down.

8 THE ARBITRATOR: Thank you.

9 MR. HUNT: For Interrogatory No. 6, we
10 asked them to identify people with knowledge.
11 Other than the BLMIS people, we didn't get a
12 single person. And we didn't get that in the
13 initial disclosures either. So there must be
14 someone we can talk to about this account.

15 THE ARBITRATOR: Yes, I agree. That
16 has to be -- you don't even say the account
17 holder, assuming that person is alive and not
18 an entity, has knowledge. And those answers
19 clearly are deficient to my mind.

20 MS. CHAITMAN: Okay.

21 MR. HUNT: Interrogatory No. 7, I
22 think I would like to withhold that one
23 because it falls into this whole category
24 of --

25 THE ARBITRATOR: Indirect.

1 MR. HUNT: Yes. But I would just
2 point out that, with respect to Interrogatory
3 No. 7, when we asked them what entity
4 received the funds withdrawn from the
5 account, they say they're unable to do so.
6 That, of course, can't be true. Someone --

7 THE ARBITRATOR: It's going to get
8 solved by the stipulation.

9 MR. HUNT: I think that's right, for
10 the most part.

11 Just going back down my list based on
12 the stipulation to see.

13 Interrogatory No. 10 --

14 MS. CHAITMAN: If I can just
15 interject, you know, for the period from
16 December 1998 on, the trustee has the front
17 and back of every check. So the trustee has
18 that information. The clients in general
19 don't have records going back that far. The
20 trustee has those records. So he doesn't
21 need me to --

22 THE ARBITRATOR: Well, again, it's
23 solved by the stipulation, which may be in
24 some instances wrong, using my Bar Mitzvah
25 example. But if you stipulated that the

1 account holder got the initial check, that
2 solves the problem.

3 MS. CHAITMAN: Right, but the trustee
4 has those records.

5 THE ARBITRATOR: I understand that.

6 You were talking, Mr. Hunt, about
7 number 10.

8 MR. HUNT: I think I'll go ahead and
9 pass on 10 at this point in time.

10 THE ARBITRATOR: I was about to say
11 10 -- just so you understand what we're
12 talking about, Ms. Chaitman -- deals with
13 where have you banked.

14 But it seems to me your entitlement to
15 that information goes out the window with the
16 stipulation.

17 MR. HUNT: It's a narrow window, but I
18 would agree with you on that.

19 With respect to Interrogatory No. 13,
20 they say they're withdrawing that defense.
21 I'd just like the order to reflect that is,
22 in fact, the case so it doesn't come up again
23 at trial. This has to do with the setoff --

24 THE ARBITRATOR: Why don't I simply
25 say that any affirmative defenses that are

1 withdrawn may not be reasserted at trial.

2 MR. HUNT: Okay. That's fine.

3 MS. CHAITMAN: Yes.

4 MR. HUNT: That are withdrawn in this
5 set of interrogatories.

6 THE ARBITRATOR: I can make it more
7 generic. Any affirmative defenses that are
8 withdrawn, whether it's in these three cases
9 or --

10 MR. HUNT: Or in a letter that they
11 sent us or whatever?

12 THE ARBITRATOR: Sure.

13 MR. HUNT: Okay. So in this
14 particular one then, Interrogatory No. 14, I
15 think they have withdrawn that affirmative
16 defense.

17 THE ARBITRATOR: Right.

18 MR. HUNT: Correct?

19 MS. CHAITMAN: Yes.

20 MR. HUNT: Interrogatory No. 15, I
21 think they've withdrawn that affirmative
22 defense; correct?

23 MS. CHAITMAN: Which one is that?

24 MR. HUNT: "Trustee's claims are
25 barred, in whole or in part, for failure to

1 properly credit inter-account transfers,
2 profit withdrawals and other adjustments."

3 MS. CHAITMAN: This was --

4 THE ARBITRATOR: I don't think they
5 have, if I'm looking at the right paperwork.
6 It says, "The trustee has admitted that
7 Madoff's records are permeated with fraud,
8 therefore, they cannot possibly be reliable
9 and/or admissible."

10 You're saying, based on the stip --

11 MR. HUNT: Yes, I think based on the
12 stipulation, they've withdrawn that
13 affirmative defense.

14 MS. CHAITMAN: No, because it's only
15 as to the specific deposits and withdrawals.
16 You know, I'm not waiving the right to object
17 to the admission of other records that the
18 trustee may seek to put into evidence at
19 trial.

20 THE ARBITRATOR: And this is an
21 example of the boilerplate because it talks
22 about inter-account transfers, but there are
23 no inter-account transfers in Train Klan.

24 MR. HUNT: There are no profit
25 withdrawals and no adjustments. So it seems

1 either they need to withdraw the defense or
2 answer the interrogatory.

3 THE ARBITRATOR: Unless you can tell
4 me why that's wrong, Ms. Chaitman, I'm
5 inclined to agree with that.

6 MS. CHAITMAN: Well, I'd like to think
7 about that. Because I don't want to waive
8 the right to object to the admission of
9 evidence at trial that is unreliable and -- I
10 don't want to have a blanket waiver. I can
11 reword that affirmative defense, but I don't
12 want to waive that.

13 THE ARBITRATOR: Well, unless you
14 convince me otherwise, I do think that the
15 stipulation, as a practical matter, means
16 that Judge Bernstein won't hear argument as
17 to anything that relates to Columns 1 through
18 5 of Exhibit B.

19 And, conceivably, since there would be
20 a lot of these trials, he may not hear
21 evidence from the trustee about it either. I
22 suppose there are experts whom the trustee
23 contemplates offering as to the accuracy of
24 the records, but I can envision a scenario
25 where Judge Bernstein says, I don't need to

1 hear that because I have the stipulation, and
2 you move on from there.

3 MR. HUNT: As long as the affirmative
4 defense is in place, the stipulation's not
5 fully effectuated. Because she claims that
6 there are some -- something to do with the
7 account that she disagrees with because
8 they're not properly credited to the account.

9 So -- I mean, I know you don't have it
10 in front of you, Ms. Chaitman, but it's clear
11 that this particular affirmative defense
12 is -- directly relates to the stipulation
13 that we just made.

14 THE ARBITRATOR: It's the 27th;
15 correct?

16 MR. HUNT: Yes, sir.

17 THE ARBITRATOR: Here. Let me show it
18 to you.

19 MS. CHAITMAN: Thanks. I didn't bring
20 my binder.

21 THE ARBITRATOR: It continues on the
22 other side.

23 (Pause from the record.)

24 MS. CHAITMAN: Okay. I would agree
25 that that is out.

1 MR. HUNT: Okay. So Interrogatory
2 No. 16, they've withdrawn that affirmative
3 defense, so that's good.

4 Interrogatory No. 17, again, I think
5 based on the stipulation that we've just
6 received, that that is an example of one of
7 the defenses that would be withdrawn.
8 Because she says that we failed to properly
9 credit defendants with all of defendants'
10 deposits.

11 MS. CHAITMAN: I agree about that.

12 MR. HUNT: Okay. Just to be clear,
13 the 46th affirmative defense is withdrawn;
14 correct?

15 MS. CHAITMAN: Yes.

16 MR. HUNT: Okay. Interrogatory
17 No. 18, we ask for parties who have knowledge
18 of the deposits and possess documents.

19 THE ARBITRATOR: Wouldn't that become
20 irrelevant by virtue of the stipulation?

21 MR. HUNT: Maybe. How about we
22 withhold on that, see what we get back from
23 them with respect to the answer to the
24 interrogatory, whether they identify a person
25 with knowledge.

1 MS. CHAITMAN: The point is, if we're
2 conceding it, why would you need to take
3 discovery? What's the benefit of conceding
4 if we're going to then have discovery on it?

5 MR. HUNT: There's still affirmative
6 defenses pled.

7 MS. CHAITMAN: We just waived the
8 specific affirmative defense.

9 THE ARBITRATOR: That's a different
10 issue. It may be that there are narrower
11 areas where a deposition or other discovery
12 could be taken, but let's not deal with that
13 in the abstract.

14 MR. HUNT: So I mean, I think
15 identifying persons with knowledge is -- and
16 who have documents is perfectly acceptable
17 discovery. We have the right to know who we
18 might be faced with at trial.

19 THE ARBITRATOR: Except you asked for
20 information concerning any transfers,
21 deposits or subsequent transfers.

22 MR. HUNT: And I agree that's not part
23 of the deal. I withdraw that.

24 THE ARBITRATOR: But I think that's
25 answered adequately by Interrogatory No. 6,

1 which is "Identify any person with knowledge
2 of any transfer" --

3 MR. HUNT: You and I are on the same
4 page with that. That's exactly what I was
5 saying. I would withhold asking for any more
6 information about this depending on the
7 quality of the information we get with
8 respect to Interrogatory No. 6.

9 THE ARBITRATOR: Okay.

10 MR. HUNT: That concludes the reading
11 for today with respect to these
12 interrogatories.

13 THE ARBITRATOR: Okay. With respect
14 to Train Klan. Don't make it sound better
15 than it is.

16 MR. HUNT: That's why I put the caveat
17 in there at the end. So we also have
18 document requests for Train Klan. Maybe we
19 could take a short break and let me look at
20 this based on the stipulation --

21 THE ARBITRATOR: Sure.

22 MR. HUNT: -- see if there's some --
23 we can streamline this a little bit.

24 THE ARBITRATOR: Absolutely. I'm sure
25 we'd all be in favor of that.

1 (Recess from the record.)

2 THE ARBITRATOR: What's next,

3 Mr. Hunt?

4 MR. HUNT: The document request in the
5 Train Klan matter, we took a short break and
6 I think we've eliminated the need for a
7 number of these, but I do want to go through
8 a few of them.

9 THE ARBITRATOR: Sure.

10 MR. HUNT: Some of them I think you
11 sort of already ruled on, but just to be
12 clear.

13 Document Request No. 1 asks for
14 organizational documents relating to the
15 partnership agreements or document with
16 equivalent function of partnership agreement
17 and any amendments to those agreements.

18 I think you've already ruled that
19 we'll get those; correct?

20 THE ARBITRATOR: Well, let me phrase
21 it this way: I made a ruling with respect to
22 it, and my order will correspond to my
23 ruling.

24 MR. HUNT: Okay.

25 THE ARBITRATOR: So I think I dealt

1 with it.

2 MS. CHAITMAN: Yeah, let's not repeat
3 the --

4 THE ARBITRATOR: Right.

5 MS. CHAITMAN: Because we're going to
6 rely on the transcript.

7 MR. HUNT: I just want to make it
8 clear.

9 Document Request No. 3 talks about
10 minutes of partnership meetings, resolutions,
11 agreements and policies concerning the
12 account, which I think falls into that
13 similar category. I would withdraw that.

14 THE ARBITRATOR: In effect, I'm
15 disallowing that one for the time being
16 except to the extent that it falls within
17 what I described earlier.

18 MR. HUNT: Falls within what? Just to
19 make clear.

20 THE ARBITRATOR: My ruling with
21 respect to the documents you get with respect
22 to the partnership, assuming there are such
23 documents. But if they were, for example,
24 investment policies, I'm denying that request
25 and the other elements of this without

1 prejudice to a later application.

2 MR. HUNT: I agree with that. That's
3 fine.

4 And then Document Request No. 4,
5 taking out the word "and limited," we are
6 looking for all general partners, current and
7 former.

8 THE ARBITRATOR: I think 4 is
9 virtually what my ruling was because it says,
10 Ms. Chaitman -- well, it says, "all
11 documents." I would take out "all" and say
12 "documents sufficient to show all general
13 partners of the partnership."

14 MR. HUNT: It actually says that, "all
15 documents sufficient to show."

16 THE ARBITRATOR: I'm taking out the
17 word "all."

18 MS. CHAITMAN: So if there's one
19 document --

20 THE ARBITRATOR: Let's assume this
21 was -- and it's not, but let's assume this
22 was Baker & Hostetler, assuming it's a
23 partnership. I would not be allowing all
24 documents sufficient to show who the partners
25 are, but just some documents sufficient to

1 show --

2 MR. HUNT: I absolutely agree with
3 that and acknowledge it.

4 The next one is Document Request
5 No. 9, documents sufficient to identify any
6 money, property or anything else of value
7 provided by you to BLMIS in exchange for any
8 initial transfer.

9 They say we have no legitimate
10 interest in any such documents. First of
11 all, we're asking about initial transfers.

12 And, second, with respect to the
13 affirmative defenses, they have Affirmative
14 Defense No. 3, which says that the defendants
15 gave reasonably equivalent value in exchange
16 for the transfers, and Affirmative Defense
17 No. 4, which relates to the antecedent debt
18 defense.

19 So as long as those defenses are still
20 pled and the issue of value given with
21 respect to the initial transfers is still an
22 issue, then we have a right to receive those
23 documents.

24 MS. CHAITMAN: Well, if I'm
25 stipulating to the deposits, I don't

1 understand why we have to produce them.

2 What's the point of stipulating to them?

3 THE ARBITRATOR: Is there a difference
4 between initial transfer and initial
5 deposits?

6 MR. HUNT: The initial transfer is the
7 withdrawal. It can be the withdrawal. So
8 they're saying that they gave value for the
9 withdrawals. That's how I read their
10 affirmative defense, unless it says something
11 different. I mean, either they withdraw
12 those affirmative defenses or produce the
13 documents related to them.

14 MS. CHAITMAN: The document related to
15 the withdrawal is the check from Madoff,
16 which the trustee has. We're stipulating
17 that we got those withdrawals.

18 MR. HUNT: I know that you don't have
19 the document in front of you, but the defense
20 that you assert is that the defendants gave
21 value to BLMIS in exchange for the
22 withdrawal. So --

23 MS. CHAITMAN: Yeah, and I'm not
24 waiving that. That's 548(c).

25 MR. HUNT: We want to know what value

1 they gave.

2 MS. CHAITMAN: That's -- the value is
3 they gave the money. I'm not waiving an
4 affirmative defense which exists under the
5 statute.

6 THE ARBITRATOR: And I think I agree
7 with Ms. Chaitman. I just want to see where
8 the definition of initial transfer is.

9 MR. JACOBS: That defense has also
10 been dismissed by Judge Bernstein. So it's
11 not applicable any longer to the case.

12 MS. CHAITMAN: It is on appeal and I'm
13 not waiving it.

14 MR. JACOBS: But it's not currently
15 applicable in the case.

16 THE ARBITRATOR: Well, then let me
17 interrupt you for a second and say, why are
18 we talking about it?

19 MR. JACOBS: We're talking about it
20 because I think we have a right to know if
21 there's another basis of value that's being
22 asserted other than just having made deposits
23 into the account. So was there -- were there
24 other monies provided that aren't reflected
25 in Exhibit B? Was a car given as a gift to

1 Mr. Madoff's grandchildren? Anything of that
2 sort I think is the point.

3 MR. HUNT: So if the answer said that
4 the only value that the parties allege is the
5 deposit, then I'm fine with not asking for
6 documents about that.

7 THE ARBITRATOR: I didn't have the
8 presence of mind to write down what the
9 stipulation as modified was, but it certainly
10 talked about will not challenge the
11 correctness. If we add the word
12 "completeness" in there, so that Ms. Chaitman
13 will not, on behalf of her clients, where
14 applicable, challenge the completeness of
15 Columns 1 through 5 of Exhibit B, seems to me
16 that would obviate your concern and I think
17 is already implicit in what --

18 MS. CHAITMAN: I agree.

19 THE ARBITRATOR: -- you said.

20 MS. CHAITMAN: I agree.

21 MR. HUNT: I agree.

22 THE ARBITRATOR: Okay. So --

23 MR. HUNT: Thank you.

24 THE ARBITRATOR: Okay.

25 MR. HUNT: So the next one that comes

1 up is Request No. 13 as it relates to
2 affirmative defenses asserted in defendants'
3 answer to the complaint. They say that such
4 documents will be produced. Modifying this
5 request to say any of the affirmative
6 defenses that have not been withdrawn, we
7 would like them to go ahead and produce the
8 documents.

9 THE ARBITRATOR: I'm lost. You were
10 talking about 13.

11 MR. HUNT: Yes.

12 THE ARBITRATOR: I'm looking at the
13 partnership responses. And it's -- 13 says,
14 "The articles of incorporation, memoranda of
15 association" --

16 MR. HUNT: Okay. I'm looking at the
17 individual. So they're slightly different,
18 maybe.

19 THE ARBITRATOR: Okay.

20 MR. HUNT: Yeah, there's only two
21 different ones. One is 12, so that's why the
22 numbering is off a little bit. So on the
23 partnership, I want --

24 THE ARBITRATOR: Forgetting the
25 numbering for the moment, is the text the

1 same?

2 MR. HUNT: Yes, sir.

3 THE ARBITRATOR: So tell me what it
4 says and I'll find it in the one I'm looking
5 at.

6 MR. HUNT: "Documents you contend
7 support any denials of fact or affirmative
8 defenses asserted in defendants' answer to
9 the complaint."

10 And their response was, "Any such
11 documents shall be produced."

12 So no documents have been produced.
13 Then modifying this request to say, "any
14 remaining denials of fact or any remaining
15 affirmative defenses," we'd like them to
16 produce the documents.

17 MS. CHAITMAN: I'm not following you.
18 You're changing the -- the document demand?

19 MR. HUNT: Yes, I'm clarifying it
20 based upon the stipulation.

21 THE ARBITRATOR: He's narrowing the
22 demand to say except -- let me rephrase it --
23 except to the extent that you've withdrawn
24 affirmative defenses, produce the documents
25 that support those affirmative defenses.

1 MS. CHAITMAN: But we've --

2 THE ARBITRATOR: And you've said you
3 will --

4 MS. CHAITMAN: To the extent that we
5 have them. And if we haven't produced them,
6 we don't have them, so --

7 THE ARBITRATOR: Okay. Then
8 anticipating what Mr. Hunt's going to say, I
9 think that he wants some representation that
10 there are none.

11 MR. HUNT: Agreed.

12 THE ARBITRATOR: So maybe I can deal
13 with that with respect to Train Klan. And
14 recognizing that there are 91 other cases
15 that you have hanging out there, but in Train
16 Klan, and maybe in the two other cases, if I
17 say, shall produce any documents relating to
18 the remaining affirmative defenses in the
19 case within ten days or be barred from using
20 such documents for any purpose --

21 MS. CHAITMAN: But aren't these
22 documents in our possession? If we're going
23 to be relying on documents that the trustee
24 has in his possession or that we're obtaining
25 from some third party --

1 THE ARBITRATOR: Sure. He's not
2 interested in what he already has.

3 MS. CHAITMAN: Right.

4 THE ARBITRATOR: It's whatever you
5 have. So it's essentially a drop-dead date.

6 MS. CHAITMAN: I have no problem with
7 that.

8 THE ARBITRATOR: Okay.

9 MS. CARLISLE: With the caveat on
10 that, within ten days or clearly indicate
11 there are no such documents.

12 MR. HUNT: What he's saying is she
13 produces them by whatever or she's barred
14 from ever using them.

15 THE ARBITRATOR: Correct.

16 MS. CHAITMAN: Unless they're
17 documents that I obtain from a third party or
18 the trustee.

19 MR. HUNT: Any third-party documents
20 that you obtain you're supposed to produce to
21 us.

22 MS. CHAITMAN: If I haven't received
23 them yet, when I produce them -- I can't
24 produce them in 10 days if I serve a subpoena
25 in 20 days.

1 THE ARBITRATOR: I --

2 MR. HUNT: I agree with that.

3 THE ARBITRATOR: Again, I'll try and
4 incorporate those two caveats into my
5 directive, and I'll make it applicable to all
6 three of the cases that are the subject of
7 the motion.

8 MR. HUNT: Okay. Thank you.

9 So the next one is -- I'm looking at
10 the individuals. I may be off by one. May
11 be 18 in the one you're looking at. But it's
12 documents you contend support the 29th
13 affirmative defense in which you contend the
14 complaint fails to state a claim on which
15 relief can be granted because it fails to
16 sufficiently trace the funds at issue from
17 BLMIS to defendants.

18 I think that --

19 THE ARBITRATOR: We don't need to, it
20 seems to me, go affirmative defense by
21 affirmative defense because the ruling
22 applies to whatever affirmative defenses
23 haven't been withdrawn.

24 MR. HUNT: That's true. And I just
25 was going to say, with respect to this one, I

1 think it's probably one that should be
2 withdrawn based upon the stipulation.
3 Because it deals with tracing to the
4 defendants. I guess if they haven't
5 withdrawn it, then we'll get the documents.

6 THE ARBITRATOR: Right. Okay. And
7 implicit in what Ms. Chaitman is saying, at
8 least as to this one, it sounds like you're
9 not going to be getting documents because
10 there are none.

11 MS. CHAITMAN: We don't have them, but
12 we'll be relying on trustee's documents.

13 MR. HUNT: Okay.

14 THE ARBITRATOR: Okay.

15 MR. HUNT: Document Request No. --

16 THE ARBITRATOR: Let me interrupt.

17 When you say you don't have them, I
18 assume you've made a good-faith effort to get
19 from your clients whatever documents they
20 have.

21 MS. CHAITMAN: Yes, the clients don't
22 have these records, Judge.

23 THE ARBITRATOR: Sure.

24 MR. HUNT: I think they do have some
25 of them, but they just haven't produced them.

1 Because you say in this that you would
2 produce them, and you haven't produced a
3 single document. But what I've done --

4 THE ARBITRATOR: Well, no, it says,
5 "any such documents will be produced," which
6 doesn't say that there aren't documents. It
7 says if there are documents, they'll be
8 produced.

9 MR. HUNT: It's sort of slickly
10 drafted, but either you have them and you
11 produce them or you don't.

12 So Document Request No. 23, any
13 documents you've received from any third
14 party --

15 THE ARBITRATOR: We discussed that.

16 MR. HUNT: -- she says she will
17 produce them if she has them.

18 I assume you don't have them at this
19 point in time; is that correct?

20 MS. CHAITMAN: Right.

21 THE ARBITRATOR: Maybe here I can make
22 a generic ruling again and say, unless
23 otherwise directed, any documents received
24 from third parties will be produced within
25 ten days.

1 MS. CHAITMAN: Yeah. And if you could
2 make that apply to the trustee as well,
3 Judge, because we've had a real problem with
4 the trustee subpoenaing third-party bank
5 records and waiting six to eight weeks before
6 they're delivered to me.

7 MR. HUNT: With respect to this case,
8 I don't have any problem with that. I don't
9 know about the other cases. But I do know we
10 routinely produce documents back to the
11 parties as soon as we get them.

12 THE ARBITRATOR: My initial reaction
13 was to make it apply to both sides. I think
14 the wording needs some tweaking unless I make
15 it specific to these three cases, because, to
16 use one of the other cases I have, if they
17 got documents relevant to Ms. Crupi, which is
18 not your case, they wouldn't have to produce
19 them to you probably unless they relate to
20 your case. But certainly with regard to
21 these three cases, yes, I will make it apply
22 to both sides.

23 MR. HUNT: Okay. And then the last
24 one was the catch-all documents consulted in
25 preparing responses to discovery. They say

1 any such documents will be produced, but we
2 have not received any documents.

3 THE ARBITRATOR: But that falls within
4 my generic ruling, which is put up or shut up
5 within ten days.

6 MR. HUNT: Okay. The only issue
7 there, though, is that gives them the option
8 of deciding whether or not to give us a
9 document that might be useful in our case.
10 So I can see how that applies to affirmative
11 defenses where they are going to be precluded
12 from using the documents, but I still think
13 that we have a right to see what evidence or
14 what information they identified in
15 responding to discovery, as a general matter.

16 THE ARBITRATOR: Except we've carved
17 out certain areas. If, for example,
18 Ms. Chaitman has file cabinets full of
19 subsequent transfers to third- and
20 fourth-generation transferees, that's not --
21 that may be something she studied at length,
22 which would be responsive to 28, but would
23 not be something you're entitled to based on
24 our discussion thus far this morning.

25 MR. HUNT: Right. So her answer said

1 that they're going to produce the documents.
2 I'll modify this to say we don't want any
3 subsequent transferee documents or any
4 documents directly related to the
5 transferees.

6 THE ARBITRATOR: She just said that
7 she will produce them. And my ruling has
8 been that any documents she's agreed to be
9 produced must be produced within ten days.
10 So if she has documents to produce, she will
11 produce them within ten days.

12 MR. HUNT: Okay. I'm fine with that.
13 Great. That's all I had on that, on
14 Train Klan.

15 THE ARBITRATOR: Okay. Who's next?

16 MR. HUNT: Next is DiGiulian.

17 THE ARBITRATOR: Okay.

18 MR. HUNT: So turning to the
19 interrogatories in DiGiulian, Interrogatory
20 No. 1 says, "Identify the reasons for the
21 transfers."

22 She says that "Withdrawals were taken
23 to pay applicable taxes, unreported
24 short-term capital gains in the account and
25 for the living expenses of Bruno DiGiulian."

1 They provide no detail about the
2 applicable taxes that were paid, nor for the
3 living expenses.

4 THE ARBITRATOR: I guess the answer --
5 putting aside the interrogatory, but the
6 answer relates to the defense, which I think
7 Judge Bernstein has stricken, which is, we're
8 entitled to a credit for taxes paid.

9 Do I have that right, Ms. Chaitman?

10 MS. CHAITMAN: I don't believe that he
11 struck it. I think that, in one case, he's
12 ruled that defendant is not entitled to a
13 credit, but, of course, we've asserted that
14 as an affirmative defense and we're going to
15 take it up.

16 THE ARBITRATOR: Right. But at the
17 moment -- I wasn't sure whether it was him or
18 a district judge, but at the moment, his view
19 is, in part, because each defendant has his
20 own unique tax situation or other expenses,
21 that they could claim that that's not a
22 credit that one of your clients can take.

23 Are we on the same page with regard to
24 that?

25 MS. CHAITMAN: Yes. He's ruled that

1 way in one case, yes.

2 THE ARBITRATOR: So given that, I'm
3 not sure why -- unless Ms. Chaitman prevails
4 on appeal, why the reason for each transfer
5 is relevant.

6 MR. HUNT: But is she withdrawing the
7 offset defense in this case?

8 MS. CHAITMAN: No, because -- here's
9 the thing: I am going to go up on appeal on
10 any issue on which I lose. I can't withdraw
11 it; right? I'm not withdrawing it. I'm
12 just -- I want to preserve it for appeal.

13 MR. HUNT: So if the defense is still
14 in the case --

15 THE ARBITRATOR: But it's not in the
16 case. It's -- if it comes back into the case
17 before trial because a district judge says
18 that Judge Bernstein erred, then we'll deal
19 with that. But at the moment, you're asking
20 for -- let me give you an analogy.

21 If this were a commercial case and
22 there were three claims in the complaint and,
23 at the motion to dismiss stage, a district
24 judge dismissed Claims 2 and 3, your argument
25 by analogy would be I still get discovery on

1 Claims 2 and 3 because Ms. Chaitman has said
2 she intends to appeal that at the end of
3 case. So that doesn't make any sense.

4 MR. HUNT: Your analogy may be a
5 little off, though, because she's saying that
6 happened in another case, but it doesn't
7 apply to this case, I think is what she's
8 saying. That's what I heard her say.

9 THE ARBITRATOR: Is that what you're
10 saying?

11 MS. CHAITMAN: There's no -- well,
12 Judge Bernstein did not rule for all the
13 cases. He ruled in one case.

14 THE ARBITRATOR: Right.

15 MS. CHAITMAN: And I'm confident he'll
16 rule exactly the same way in every other
17 case.

18 THE ARBITRATOR: Right.

19 MS. CHAITMAN: But I should add one
20 other thing --

21 THE ARBITRATOR: You're not trying to
22 be the Artful Dodger by saying, well, it only
23 applies to that case --

24 MS. CHAITMAN: No, I mean, I can't
25 imagine Judge Bernstein -- maybe he would

1 change his mind, but I don't think he would.

2 But the thing is that -- I want to
3 point out that in each of my cases, what I am
4 doing is submitting an accountant's affidavit
5 as to exactly what the taxes paid were. So
6 they're getting that information, but they're
7 getting it through an accountant's affidavit.
8 We've been supplying those in a timely
9 manner.

10 THE ARBITRATOR: But -- and that deals
11 with a document request rather than an
12 interrogatory. But I think one of the things
13 that the trustee said in his papers is that
14 they're entitled to those underlying
15 documents in the earlier stage.

16 I'm not sure how it really helps you,
17 getting it at the earlier stage, but I don't
18 disagree with you that you're entitled to it.
19 It's, in effect, that which the accountant
20 would rely on.

21 MS. CHAITMAN: Well, we're viewing it
22 pretty much as an expert's report. We're
23 redacting -- the trustee's only entitled to
24 the information on the tax return which
25 relates to the Madoff income. So it's a

1 laborious process of redacting the tax
2 returns.

3 And that's what we're doing. And
4 we're doing it in the form -- producing these
5 declarations. So we're producing it. We're
6 just not producing it in the first stage.

7 MR. HUNT: Are you going to produce
8 one in this case?

9 MS. CHAITMAN: We're producing
10 declarations in each of the cases. You've
11 gotten a lot of them already.

12 MR. HUNT: As long as the order says
13 that when a declaration comes, the underlying
14 documents supporting it are produced --

15 MS. CHAITMAN: In a redacted form,
16 which is -- it just shows the --

17 MR. HUNT: I don't --

18 MR. JACOBS: There's no redaction for
19 relevance permitted under the case law rules,
20 to my knowledge.

21 THE ARBITRATOR: Well, typically there
22 would not be. There are confidentiality
23 orders obviously in all of these cases. By
24 the same token, if Mr. DiGiulian has
25 \$10 million in earned income, I'm not sure

1 that's relevant to anything that the trustee
2 is concerned with.

3 MR. JACOBS: It may or may not be,
4 your Honor, but we went through this exercise
5 with Ms. Chaitman concerning the Rule 35 bank
6 records where she attempted to unilaterally
7 redact out transactions that weren't related
8 to the BLMIS account.

9 And the judge explicitly overruled
10 that because, until we see the information,
11 we can't make a fair determination as to
12 whether it's relevant or not, given the
13 nature of the defenses that have been
14 asserted. And there is a confidentiality
15 protective order in place that will protect
16 from the disclosure any of that confidential
17 information outside of use in the litigation.
18 So it -- it's not a valid concern.

19 THE ARBITRATOR: Did I hear
20 Ms. Chaitman say you've already gotten --

21 MR. HUNT: We haven't gotten any of
22 the underlying documents.

23 MS. CHAITMAN: They haven't gotten the
24 documents yet, but the thing is --

25 THE ARBITRATOR: Give me sort of a

1 timeline. When did you get the first of the
2 accountants' reports?

3 MS. CARLISLE: I believe I've received
4 three of them, only one of the cases. And
5 I'm not a hundred percent sure it's the
6 Gordon case. There are two cases against
7 Ms. Gordon. The first ones I received were
8 probably in August --

9 MS. CHAITMAN: I don't remember.

10 MS. CARLISLE: -- or September. The
11 other two cases, fact and expert discovery is
12 currently closed. These cases are much --
13 are further along. And they were
14 one-to-two-page declarations from the
15 accountants just setting forth the amount of
16 taxes purportedly paid by these individuals.

17 MR. JACOBS: That's the problem with
18 the reports, your Honor; they're hearsay.
19 Because none of the other underlying
20 documents or source information is provided.
21 One of the affidavits, it's not in any of the
22 cases before your Honor today, actually says
23 that the information provided in the
24 affidavit was based on discussions with
25 defendant from recollection. It's really --

1 it's rather egregious.

2 And the first one we ever received was
3 served on us after expert discovery had
4 closed. So whether it's even fairly
5 considered in the case is a full separate
6 argument that we don't need to delve into
7 today.

8 But the fact of the matter is that all
9 of these underlying documentation, including
10 the taxes, must be produced in fact discovery
11 in each of these cases, regardless of whether
12 an affidavit is supplied by a fact witness or
13 a purported expert witness of any sort. And
14 that's a pretty standard discovery --

15 THE ARBITRATOR: As a general rule, I
16 agree with you, but I'm not unsympathetic to
17 what Ms. Chaitman is saying, which is -- she
18 hasn't said this, but I think what she's
19 trying to say is that, until my expert issues
20 his -- assuming it's a he -- his report, I
21 don't know what documents I'm supposed to be
22 producing; and, conversely, I'm not sure that
23 you're really prejudiced by getting the
24 documents with the report, although you
25 haven't been getting it with the report thus

1 far.

2 MR. JACOBS: Right.

3 MS. CHAITMAN: And the other thing --

4 THE ARBITRATOR: And I suppose the way
5 in which you might be prejudiced is if that
6 occasions a need to depose that particular --

7 MR. JACOBS: Right.

8 THE ARBITRATOR: -- defendant. But if
9 there are documents produced in expert
10 discovery that conceptually should have been
11 produced in fact discovery, obviously, I
12 would look favorably on a request to depose
13 that defendant out of time.

14 MR. JACOBS: Right. Just a point of
15 confusion. These aren't expert reports.
16 They're entirely factual in nature. There's
17 no expert analysis. There's no purported
18 expert qualification. There's no disclosures
19 made under Rule 45 as that would be required
20 in connection with the designation of any
21 expert. They're not being submitted in a
22 timely fashion on -- prior to the expert
23 disclosure dates, as required under the case
24 management orders.

25 So it's essentially the defendant has

1 said, I'm just going to force upon the
2 trustee a hearsay affidavit on factual issues
3 without any underlying documentation whenever
4 I want without regard to the rules or the
5 judge's orders. And --

6 THE ARBITRATOR: It also relates to an
7 affirmative defense, which at the moment is
8 not in the case.

9 MR. JACOBS: Well, your Honor, it's in
10 the case until -- in my view, it's in the
11 case until we have either Ms. Chaitman
12 withdraws it affirmatively or we have a court
13 order dismissing it from the case.

14 THE ARBITRATOR: Ms. Chaitman concedes
15 that -- unless she comes up with another
16 argument that sways Judge Bernstein, that
17 he's going to make the same ruling throwing
18 out the tax credit affirmative defense --

19 MR. JACOBS: Right.

20 THE ARBITRATOR: -- in all of her
21 cases.

22 MR. JACOBS: If it's not in the case,
23 your Honor, why should the defendant be
24 allowed to enter into evidence supporting it
25 into the factual record if it's not in the

1 case? It's the same argument that
2 Ms. Chaitman makes that we're not allowed to
3 take discovery to frame a complaint. Right?
4 I mean --

5 THE ARBITRATOR: Let me --

6 MR. JACOBS: It's in the case or it's
7 not I guess is the contention we're grappling
8 with here.

9 THE ARBITRATOR: Let me tell you the
10 way in which I contemplate ruling on this,
11 and then both sides can take pot shots at it,
12 which is that any report by an accountant or
13 expert relating to the tax credit affirmative
14 defense must be accompanied by the unredacted
15 underlying documents upon which the report
16 relies.

17 MS. CHAITMAN: Well, I would quarrel
18 with the unredacted portion of that because
19 the only credit we're seeking is for the
20 Madoff income.

21 THE ARBITRATOR: But --

22 MS. CHAITMAN: And the trustee's not
23 entitled to information about the defendants'
24 income other than that.

25 THE ARBITRATOR: Well, one of the

1 problems is the trustee may get a lot more
2 stuff than he wants. Some of these people
3 may have Trump-like returns.

4 MR. HUNT: Then they'll get nothing.

5 THE ARBITRATOR: Hmm?

6 MR. HUNT: Then they'll get nothing.

7 THE ARBITRATOR: Good point.

8 Hang on a second.

9 Off the record.

10 (Discussion off the record.)

11 THE ARBITRATOR: Back on the record.

12 I agree with what's been said about
13 redactions for relevance typically not being
14 allowed, but there are numerous potential
15 schedules to tax returns which are wholly
16 irrelevant and, both from a burdensomeness
17 perspective and from a privacy perspective,
18 I'm sympathetic to the defendants' desire to
19 shield that from disclosure.

20 What I will require be produced in
21 unredacted form, at the same time as an
22 accountant's or expert's report relating to
23 this affirmative defense, will be the first
24 two pages of the tax return and any schedules
25 or other attachments that relate specifically

1 to the Madoff capital gains in unredacted
2 form.

3 Now, that doesn't deal with the
4 reports you've gotten thus far, but my ruling
5 with respect to that will be that, for
6 reports you've gotten thus far, that that
7 material be produced within ten days.

8 MR. HUNT: So I agree with all that.
9 I just wanted to add some clarification.

10 In addition, any documents that the
11 expert relied on, if he's being offered as an
12 expert, right, just like you would in the
13 normal rules.

14 MR. JACOBS: I think even more
15 generally I would add, any documents that
16 were -- that the -- any source material for
17 any information that's included in the report
18 should be disclosed in its entirety
19 regardless of whether it's construed as an
20 expert or an accountant's report; otherwise
21 it's hearsay.

22 THE ARBITRATOR: Well, to take the
23 example you gave, you said there's one report
24 that seemed to rely on a conversation with
25 the defendant, but --

1 MR. JACOBS: Right.

2 THE ARBITRATOR: -- if that
3 conversation were a letter instead, you would
4 want the letter.

5 MR. JACOBS: Right. Because a
6 defendant can offer sworn testimony, and we
7 can challenge the veracity or discredit on
8 cross-examination just like we would at
9 trial.

10 MR. HUNT: I would just say, you know,
11 produce the documents that he's relying on
12 and we can question --

13 THE ARBITRATOR: But he's relying
14 potentially on tax returns, and I made a
15 limited ruling with respect to the tax
16 returns.

17 MR. HUNT: And I think the point then
18 is --

19 THE ARBITRATOR: So I'm tacking on to
20 the ruling as well as any additional
21 documents upon which the expert has relied.

22 MR. HUNT: Okay. That's good.

23 THE ARBITRATOR: Any objection to
24 that, Ms. Chaitman?

25 MS. CHAITMAN: No.

1 MR. JACOBS: Agreed, except for with
2 the fact that it's construed as an expert,
3 which I believe we will challenge.

4 THE ARBITRATOR: I will clean that up.
5 It will say accountant or expert.

6 MR. JACOBS: And, your Honor, on the
7 tax returns, can we clarify. I believe in
8 addition to the taxes paid, any schedules
9 specifically regarding the Madoff investment
10 and any taxes paid on those capital gains, we
11 would also be entitled to information
12 concerning the defendants' both -- full scope
13 of refunds in that same given year regardless
14 of whether or not --

15 THE ARBITRATOR: You're getting the
16 first two pages of the return.

17 MR. JACOBS: So I'm just --
18 respectfully, without those in front of me, I
19 can't verify all the information that that
20 includes. I don't think I'm as familiar with
21 them as you are. I'm just looking to confirm
22 that that information would be reflected in
23 the scope of the materials you've ordered are
24 allowed.

25 I just want to confirm. Because the

1 refund is relevant. Whether the defendant
2 got a refund on the taxes paid or used the
3 tax liability to offset -- or a refund to
4 offset liabilities in subsequent years is
5 equally, from our perspective, relevant.

6 THE ARBITRATOR: I think you're
7 getting what you want. Why don't you consult
8 with somebody at your firm. And if there
9 are -- if there's something additional that
10 relates to that, send me a letter. And after
11 Ms. Chaitman has had an opportunity to
12 respond, I'll modify it.

13 MR. JACOBS: Perfect.

14 MR. HUNT: Once we get the first set
15 of documents that will help; right?

16 THE ARBITRATOR: Right.

17 Off the record.

18 (Discussion off the record.)

19 THE ARBITRATOR: Back on the record.

20 MR. HUNT: I'd like to move to
21 Interrogatory No. 3, "Identify each deposit
22 into the account." They say, "Responding
23 party is unable to do so. To the extent we
24 have reliable third-party records, they will
25 acknowledge the deposit."

1 We've provided them with a large
2 number of third-party records. So I would
3 just ask that they amend this answer to
4 reflect that and then withdraw all the stuff
5 about riddled with fraud and all that other
6 stuff, if it's appropriate.

7 THE ARBITRATOR: I'm looking at the
8 Answer to Interrogatory 8, which doesn't have
9 the "however" and "moreover" paragraphs, but
10 says, "Responding party does not dispute the
11 deposits and withdrawals reflected on
12 Exhibit B to the complaint," and then it has
13 the word "on," which is stuck in there for
14 some reason, but I assume it's just a typo.

15 So I think what Ms. Chaitman was
16 trying to do was say, we're not disputing
17 Columns 1 through 5 of Exhibit B relating to
18 this defendant, but, independent of that, we
19 can't identify each deposit.

20 You were saying there's an
21 inconsistency there.

22 MR. HUNT: Exactly.

23 THE ARBITRATOR: I think I understand
24 what she's trying to do, but I think the
25 stipulation which will apply to this case

1 obviates the need for an answer to that
2 interrogatory.

3 MR. HUNT: Do we have that same
4 stipulation with respect to this case?

5 THE ARBITRATOR: I thought we have it
6 an all three of these.

7 MS. CHAITMAN: We agreed that we have
8 it on all three of them. In each of these
9 cases, we have agreed to the accuracy of
10 Exhibit B.

11 THE ARBITRATOR: Right.

12 MR. HUNT: At Columns 1 through 5;
13 right?

14 THE ARBITRATOR: Yes, but one of those
15 is each deposit into the account.

16 MR. HUNT: Yes. Okay.

17 Interrogatory No. 4 asks for names of
18 persons with knowledge. They did not give us
19 any other than Madoff employees.

20 THE ARBITRATOR: We're going back over
21 the same ground.

22 MR. HUNT: Right.

23 THE ARBITRATOR: Ms. Chaitman is going
24 to provide you with the names of the people
25 on her side of the beam.

1 MS. CHAITMAN: But in this case, Bruno
2 DiGiulian is deceased. His wife had nothing
3 to do with the account, so she has no
4 knowledge. You know, I don't have any
5 information to provide.

6 THE ARBITRATOR: That's fair.

7 MR. HUNT: Well, she does have
8 knowledge. She signed the interrogatory
9 responses and --

10 MS. CHAITMAN: She signed them because
11 they had to be verified, and she was the only
12 person who could verify it, but she couldn't
13 verify any more information than we put in
14 here. That's why we didn't put anything else
15 in because this is all she could verify.

16 THE ARBITRATOR: And, also, it becomes
17 irrelevant because transfer means withdrawals
18 or does it also mean deposits?

19 MR. HUNT: It means both.

20 THE ARBITRATOR: But they've been
21 stipulated to. So even if the entire Mormon
22 Tabernacle Choir is familiar with them, it's
23 irrelevant.

24 MR. HUNT: Well, I do think we have
25 the right to know who the -- who their

1 accountants were and tax preparers and so
2 forth. They have not given us a single name
3 of people with knowledge, whether --

4 THE ARBITRATOR: I -- I disagree.
5 Insofar as deposits and withdrawals have been
6 stipulated to and cannot be challenged at
7 trial, it really doesn't matter, as I've
8 said, how many people or who has knowledge of
9 those.

10 MR. HUNT: One of the things that they
11 say in these interrogatory responses is that
12 Bruno DiGiulian was the subsequent
13 transferee, in Interrogatory No. 5. He was
14 not. That's a legal argument. So I want to
15 make it clear that they're not withholding
16 information relating to Mr. DiGiulian on the
17 basis that he's thought to be a subsequent
18 transferee in the defendants' mind.

19 THE ARBITRATOR: Well, they're telling
20 you Bruno got the money except --

21 MS. CHAITMAN: He got it as a
22 subsequent -- because this was an IRA
23 account. So there was a custodian and this
24 is a legal argument.

25 THE ARBITRATOR: Right.

1 MS. CHAITMAN: It's --

2 MR. HUNT: So they need to, I think,
3 identify who, in their mind, received the
4 initial transfer.

5 MS. CHAITMAN: It says from Fiserv.

6 MR. HUNT: Where does it say that?

7 MS. CHAITMAN: "The account holder,
8 Bruno L. DiGiulian, was the subsequent
9 transferee from Fiserv of each transfer,
10 except for withdrawals needed to pay
11 applicable taxes."

12 MR. HUNT: So I think any information
13 about communications between Fiserv and
14 DiGiulian are irrelevant because DiGiulian is
15 sued as the initial transferee here.

16 THE ARBITRATOR: Well, except this is
17 only asking -- this is an interrogatory, not
18 a document request. And I suppose she hasn't
19 complied with the local rule. I'm not even
20 sure if it's applicable in bankruptcy court,
21 which makes "identify" a term of art, but
22 unless you don't know who Fiserv is, it seems
23 to me she's adequately answered this.

24 MR. HUNT: Okay.

25 THE ARBITRATOR: She may be wrong as a

1 matter of law or she may be right as a matter
2 of law, but I think she's made it clear what
3 the flow of the money was.

4 MR. HUNT: So just go to Interrogatory
5 No. 9 where we ask them to identify
6 communications about disagreements. And this
7 is 9 and 10. She says she has no personal
8 knowledge, but she believes such instances
9 occurred.

10 THE ARBITRATOR: Again, it's not a
11 document request.

12 MR. HUNT: It's just -- if she
13 believes such instances occurred, then what's
14 the basis of that belief?

15 THE ARBITRATOR: Well, if you want to
16 pursue this, I suppose you could -- maybe
17 she's one of the people -- I think she is --

18 MS. CHAITMAN: Yes.

19 THE ARBITRATOR: -- for the motion for
20 a protective order, but absent that, you
21 could depose her about whether she has any --

22 MR. HUNT: As long as we have the
23 right to depose her, that's fine. We can
24 leave it that way.

25 MS. CHAITMAN: Well, we've asked

1 for --

2 THE ARBITRATOR: We'll deal with that
3 down the road. For the moment, I'm not going
4 to worry about that.

5 MR. HUNT: Not going to worry about
6 what?

7 THE ARBITRATOR: The however she
8 believes such instances occurred. She hasn't
9 identified any such instances, so the fact
10 that her Ouija board told her that there were
11 such instances does not mean that there's
12 more detail for her to give you.

13 MR. HUNT: I think the Interrogatory
14 No. 11 -- I think you've ruled that we get
15 those forms and everything, so I think we're
16 fine.

17 THE ARBITRATOR: Yes.

18 MR. HUNT: Interrogatory No. 12 I
19 think is obviated by the fact that they've
20 stipulated to everything in --

21 THE ARBITRATOR: In any case --

22 MR. HUNT: -- Exhibit B.

23 THE ARBITRATOR: We've gone through
24 this already.

25 In any case where Ms. Chaitman enters

1 into the stipulation we've been discussing,
2 the defense that defendants' liability was
3 fraudulently calculated, which is the 20th
4 affirmative defense, goes out the window.

5 MR. HUNT: And also the 27th
6 affirmative defense; right? The next one
7 down.

8 THE ARBITRATOR: Yes.

9 MR. HUNT: Okay. They have an
10 affirmative defense in Interrogatory No. 14
11 about the withdrawals were legally compelled
12 by state and federal securities laws. And
13 they say, see Interrogatory No. 11. Which
14 will be based upon the responding party's
15 testimony. So I guess as long as we get to
16 depose her, we can wait and see what her
17 testimony was.

18 THE ARBITRATOR: Whether you do or
19 don't, and I'm not sure where I read it, but
20 in IRA accounts, for people who are beyond 70
21 1/2, whatever that magic time period is,
22 Ms. Chaitman is saying they had to take the
23 money out.

24 That's all you're saying.

25 MS. CHAITMAN: That's all I'm saying.

1 MR. HUNT: Then she can answer the
2 interrogatory to explain to us what the
3 reason is rather than just saying --

4 MS. CHAITMAN: Well, I'm saying it's
5 legally compelled under the --

6 THE ARBITRATOR: Yeah, but maybe -- I
7 think it's a fair point.

8 MR. HUNT: We're guessing at what
9 she's saying at this point.

10 THE ARBITRATOR: Hang on a minute.
11 You're not saying what I just said.
12 And to the extent that what I just said is
13 the accurate answer, I think you should
14 modify each of these answers, where
15 applicable, to say, whatever the right
16 verbiage is, that sometime beyond 70 1/2,
17 because it was an IRA account, the money has
18 to be taken out in installments.

19 That's the factual basis; right?

20 MS. CHAITMAN: Right.

21 Can I do this in one document instead
22 of in 92 documents?

23 THE ARBITRATOR: I'm inclined to say
24 yes.

25 MS. CHAITMAN: Okay.

1 MR. HUNT: Okay. So that's all I had
2 on the interrogatories.

3 THE ARBITRATOR: Okay.

4 MR. HUNT: You told us we'd start
5 getting repetitive. You were right.

6 THE ARBITRATOR: Benjamin, is there
7 anything --

8 MR. HUNT: We have document requests
9 on DiGiulian, and I was going to suggest that
10 maybe we take another break and let us go
11 through that and see if we can streamline
12 that. And also take a look at Benjamin to
13 see if we can streamline it as well.

14 THE ARBITRATOR: Sure.

15 (Recess from the record.)

16 THE ARBITRATOR: What's next?

17 MR. HUNT: We left off with I think --
18 correct me if I'm wrong, I think we left off
19 with the DiGiulian request for production; is
20 that right? The document request, yes,
21 that's where we left off.

22 So just two points on that, and then I
23 think we can move on.

24 I want to make sure that no documents
25 are being withheld based on the presumption

1 that Bruno would be a subsequent transferee.
2 Because he sued as an initial transferee. So
3 can the defendants make that representation?

4 MS. CHAITMAN: That no -- no
5 documents -- what --

6 MR. HUNT: Are being withheld based on
7 the presumption that Bruno DiGiulian was a
8 subsequent transferee.

9 MS. CHAITMAN: Yes. We haven't
10 withheld documents based on that.

11 MR. HUNT: So as long as your Honor's
12 order applies to this case, I didn't see
13 anything different in there that led me to
14 believe we needed to go over the document
15 requests with any specificity.

16 Looking at the next case, which was
17 the Benjamin case --

18 THE ARBITRATOR: Right.

19 MR. HUNT: -- just to confirm, the
20 defendants have stipulated to the accuracy of
21 Columns 1 through 5 on Exhibit B in Benjamin;
22 correct?

23 THE ARBITRATOR: Correct?

24 MS. CHAITMAN: Yeah, we've said that
25 several times.

1 MR. HUNT: So based on that, I didn't
2 see -- and the rest of the order would apply
3 to this one, I didn't see anything different
4 here that we needed to talk about.

5 THE ARBITRATOR: Great. So we're done
6 with the trustee's motion; correct?

7 MR. HUNT: Yes, sir.

8 THE ARBITRATOR: Good.

9 MS. CHAITMAN: So would you like me to
10 start on our motion to compel?

11 THE ARBITRATOR: Sure.

12 MR. HUNT: Is that on the Wilenitz
13 case?

14 MS. CHAITMAN: I think it's easier to
15 deal with the document demand that we served
16 on all the other cases.

17 MS. CARLISLE: I request we give Ted a
18 minute because he's handling Wilenitz so that
19 he can be here -- physically here to hear
20 what you have to say.

21 THE ARBITRATOR: We can do the motion
22 for a protective order.

23 MS. CHAITMAN: Okay. Let's do that.

24 MR. HUNT: That's fine.

25 MS. CHAITMAN: Long as you don't need

1 Ted for that.

2 MR. HUNT: What's the other one you're
3 thinking about?

4 MS. CHAITMAN: We served
5 interrogatories -- excuse me -- yes --

6 MR. HUNT: That must be in the
7 Wilenitz case.

8 MS. CHAITMAN: No, this is not. We
9 served in Wilenitz. Then we --

10 MS. CARLISLE: Well, you served in --
11 no, you said --

12 MR. HUNT: Just -- that's Ted's deal;
13 right?

14 MS. CARLISLE: Sorry. Wilenitz is
15 Ted's deal, yes.

16 MR. HUNT: I don't know what this is
17 that she's got in front of us.

18 MS. CHAITMAN: We served document
19 demands and interrogatories in one document,
20 and we served it in about 60 cases. And then
21 we moved to compel -- you responded and we
22 moved to compel. And then that was assigned
23 to Judge Maas.

24 MS. CARLISLE: The dispute was
25 assigned to Judge Maas. As I understood it,

1 it was only the Wilenitz -- it was only
2 assigned to Judge Maas in the Wilenitz case,
3 not in the other -- I apologize. I don't
4 know how many cases those were brought in.

5 MS. CHAITMAN: No, we agreed to have
6 everything that was before Judge Bernstein
7 assigned to Judge Maas.

8 MR. HUNT: Do you know what she's
9 talking about?

10 THE ARBITRATOR: No.

11 MS. CARLISLE: Wilenitz.

12 MR. HUNT: Let's do the motion to
13 quash and then figure out what's next.

14 THE ARBITRATOR: Off the record.

15 (Discussion off the record.)

16 MS. CHAITMAN: So if I could start --
17 we made a motion to compel responses to our
18 interrogatories and to compel the trustee to
19 produce documents.

20 THE ARBITRATOR: In --

21 MS. CHAITMAN: It's defendants listed
22 on Exhibit A to first set of requests. It's
23 this one (indicating).

24 MR. JACOBS: Your Honor, we had a
25 hearing with Judge Bernstein on this issue

1 where Judge Bernstein explicitly said that
2 Ms. Chaitman's motion could go forward on
3 Wilenitz only, even though she attempted to
4 bring it across all --

5 THE ARBITRATOR: That's true, but he
6 also said that the rulings would be of
7 general application. Then he made tentative
8 rulings.

9 MR. JACOBS: Right. And that's
10 consistent with, I believe, the position we
11 articulated earlier, which is that, in cases
12 with identical factual or legal
13 circumstances, we will apply those rulings.
14 And we are cross-moving for a protective
15 order prohibiting this discovery in this
16 case. So if we obtain one, we would like
17 that to apply in other cases as well.

18 But I think as you'll see when we get
19 into the argument, there are some
20 case-specific issues that might dictate
21 results that might not happen the same way in
22 other cases on certain requests.

23 THE ARBITRATOR: Does it make sense to
24 just ignore those for the moment, deal with
25 Wilenitz and then discuss how it applies

1 potentially --

2 MR. JACOBS: That's exactly how we
3 would like to move forward, is to deal with
4 Wilenitz. Because that's the motion in the
5 case currently before us today, and we can
6 talk afterwards about how those rulings may
7 apply in other contexts.

8 THE ARBITRATOR: Does that work with
9 you, Ms. Chaitman?

10 MS. CHAITMAN: Do we have the Wilenitz
11 responses to discovery? Do you have those?

12 MR. JACOBS: Let me look.

13 MS. CHAITMAN: Because I have the ones
14 you responded to with the defendants --

15 MR. JACOBS: Right.

16 MS. CHAITMAN: -- and this is what I
17 had submitted to Judge Maas.

18 MR. JACOBS: Right. So that's what's
19 complicated, is that there was an original
20 set in Wilenitz. Right. And we had a
21 hearing before the court. The judge
22 authorized the motion and then you served a
23 nearly identical, but slightly revised set
24 across all of your cases --

25 MS. CHAITMAN: Right, because I took

1 out the Picard compensation. That's the only
2 change which I recall.

3 MR. JACOBS: There are two requests
4 that are new --

5 THE ARBITRATOR: Yes, you substituted
6 two requests for the --

7 MS. CHAITMAN: Do you have a problem
8 in raising those?

9 MR. JACOBS: No, we'll -- we're
10 prepared to proceed on your second set of 18
11 requests, which is the revised version, if
12 that's amenable to you.

13 MS. CHAITMAN: So do you have --

14 THE ARBITRATOR: Yes, I think we're
15 all on the same page.

16 MS. CHAITMAN: All right. Great.

17 So this is what the caption looks
18 like. Are you --

19 THE ARBITRATOR: You're just trying to
20 get me to the request. I have -- let's see.
21 I actually have it in slightly different
22 form. And I know that there's a substitution
23 for two of the requests, but I think it --
24 I'll be able to follow.

25 MS. CHAITMAN: Okay. So I'm turning

1 to page 6, which is our first document

2 request. Wilenitz discovery demand.

3 THE ARBITRATOR: List every employee?

4 MS. CHAITMAN: Yes.

5 "List the name and address of every
6 former BLMIS employee with whom you spoke
7 about the meaning of entries on the customer
8 statements and state the substance of what
9 you questioned each person about and what
10 that person told you."

11 Then "Produce all documents you
12 reviewed with such employee and all documents
13 indicating what each person said."

14 So the --

15 THE ARBITRATOR: And they gave you --
16 I'm not sure they gave it to you specifically
17 in Wilenitz, but -- I think they did, but
18 they gave you an exhibit which relates
19 apparently to 2008 only and had been filed in
20 the Dusek case that basically gave the
21 identifying information for -- it looks like
22 everybody that was on the payroll --

23 MR. JACOBS: Right.

24 THE ARBITRATOR: -- in 2008, but
25 didn't respond to anything else --

1 MS. CHAITMAN: Right.

2 THE ARBITRATOR: -- as to your
3 request.

4 MS. CHAITMAN: Right.

5 MR. JACOBS: The Dusek response in the
6 list you're referring to I believe we
7 produced in connection with a later request,
8 not number 1.

9 THE ARBITRATOR: Oh, okay.

10 MR. JACOBS: That was a different
11 request asking for the identification of
12 employees by function at BLMIS.

13 THE ARBITRATOR: But wouldn't it, at
14 least for 2008, respond to the first part of
15 Request No. 1, list -- oh, no.

16 MS. CHAITMAN: With whom you spoke.

17 THE ARBITRATOR: Okay.

18 MR. JACOBS: The objection -- your
19 Honor, if I may, our objection to Request
20 No. 1 is that it is on its face asking for
21 the trustee's work product. It's asking for
22 us to identify the list of employees that we
23 may have spoken to in connection with our
24 investigation as to any facet of the
25 trustee's responses and, I'll just add,

1 duties and responsibilities with respect to
2 his role in liquidating the estate and in
3 recovering funds for the customer fund.

4 That information -- that list, in and
5 of itself, not to mention what is requested
6 after the identification, which is the actual
7 notes of those interviews, is protected work
8 product under Taylor v. Hickman. It falls
9 squarely within the work-product doctrine.
10 It's the trustee's mental impression in
11 preparation for litigation as to his strategy
12 in discerning information and his mental
13 impressions about how he may use that.

14 So we object to this request in its
15 entirety. It's prima facia, outside the
16 scope of what's discoverable in this
17 instance.

18 MS. CHAITMAN: My answer to that,
19 Judge, is that, under the Securities Investor
20 Protection Act, the trustee has an
21 affirmative obligation to investigate the
22 debtor and report to the creditor body and to
23 the bankruptcy court what his findings are.

24 And we do not have access to this
25 information. And it's essential for us in

1 terms of formulating some of our defenses.

2 And that's why I think we're entitled to this
3 information.

4 THE ARBITRATOR: Let me ask a
5 question, which is, are there any documents
6 that have been shown to former Madoff
7 employees that have not been produced in the
8 litigation?

9 MR. JACOBS: I don't know that,
10 sitting here today, I can answer that
11 question, your Honor, but I think that --

12 THE ARBITRATOR: I suppose you could
13 have shown a particular employee --

14 MR. JACOBS: How to --

15 THE ARBITRATOR: -- Mr. Benjamin's
16 account records, but not to have produced
17 them in Mr. Wilenitz's case.

18 MR. JACOBS: Right.

19 THE ARBITRATOR: So excluding that.

20 MR. JACOBS: Right. So I think the
21 starting point of this discussion has to be
22 Rule 26 and the fact that what is
23 discoverable in this case, in Wilenitz, must
24 be both relevant to the claims in this case
25 and proportionate, most importantly, to the

1 needs of the parties in discovery. And there
2 are several factors enumerated in the rule as
3 to how to determine proportionality.

4 So it is possible we showed a document
5 to an employee that has nothing to do with
6 any of the claims or defenses in this case,
7 in which case we have no obligation to
8 produce it or make it available in any form.
9 I don't think that's the case.

10 But that being said, as I'm sure you
11 read in our papers and we'll be discussing in
12 connection with other requests, we have made
13 an unprecedented amount of the trustee's
14 books and records available to all
15 defendants, including the defendants here,
16 specifically all of the over 4 million
17 records that we've made available through
18 Electronic Data Room 1 in a very carefully
19 curated, organized fashion. And those
20 documents touch upon all aspects of the
21 operations and financials of the BLMIS.

22 So I don't think it's likely that we
23 can't -- to answer your question explicitly,
24 I can't, sitting here today, represent that
25 there was no document that we've shown any

1 employee on any topic that hasn't been put in
2 that data room or otherwise produced, but
3 it's highly, highly unlikely.

4 The trustee has not engaged in any
5 hide-the-ball efforts here. We have spent
6 years working to find solutions to very
7 complex discovery issues given the volume of
8 data we have that we're responsible for. And
9 our goal is to make it as available and to be
10 as transparent to all litigants to the
11 fullest extent possible. So that's what
12 we've done with e-Data Room 1.

13 And we also have undertaken
14 painstaking efforts to provide the defendants
15 with the full universe of all documents we
16 believe that are relevant to the claims and
17 defenses in this case from that data set.

18 So all of that said, I still don't
19 think that there's any proportionate
20 articulated defensible reason why the
21 defendant should be entitled to our
22 investigatory mental impressions and work
23 product in connection with any interviews of
24 BMLIS employees we did.

25 Now, certainly we would give them

1 transfers if we had taken a deposition. They
2 are taking their own depositions of
3 Mr. Madoff and potentially others. And that
4 is all fair game for the record, but this
5 request is specifically calling for work
6 product. This is not calling for -- even our
7 selection -- I would posit that potentially
8 even our selection of documents that we chose
9 to show a particular employee is a
10 compilation that's protected work product.
11 That doesn't mean we wouldn't produce them if
12 they were responsive and nonobjectionable to
13 other valid requests within the scope of
14 relevance, but the defendants shouldn't be
15 entitled to the disclosure of that work
16 product in connection with this request.

17 MS. CHAITMAN: Let me just say, Ted
18 has raised the issue of -- two issues that I
19 think are important for you to rule on.

20 One is that the trustee has
21 consistently taken the position that the
22 discovery should be limited to what is
23 appropriate for a particular case. And, in
24 fact, the argument has been made that in
25 so-and-so's case, the trustee's only suing

1 for \$200,000, therefore, the trustee should
2 not have to produce a lot of documents, it's
3 only a \$200,000 case.

4 We view these cases as one in the
5 sense that I represent 92 defendants in 92
6 cases, several hundred people all together,
7 and that all of this discovery is relevant
8 for all of the cases.

9 THE ARBITRATOR: I'm not sure I read
10 the trustee's proportionality argument that
11 way, but I think the fundamental problem here
12 is that the request calls for classic work
13 product. Work product is not absolute except
14 as to so-called core work product.

15 But just on the face of it, and in
16 response to many of these requests, I think I
17 agree with what I read Judge Bernstein's
18 off-the-cuff rulings were or opinions were,
19 but I'm not sure how you get around the rule
20 protecting work product here.

21 MS. CHAITMAN: Well, I think that
22 there is.

23 THE ARBITRATOR: Other than your SIPA
24 argument.

25 MS. CHAITMAN: Right. So, number 1,

1 the trustee has an affirmative duty to do
2 this, and we contend that he has failed in
3 his duty.

4 The second thing is that there's a
5 substantial need here because we don't have
6 the ability to get this information from any
7 other source.

8 And going to the e-data room, since
9 Ted mentioned that, honestly, Judge, the
10 e-data room is a farce. I made the point in
11 my papers that it's at least six weeks ago
12 that I asked Ted and Marie to tell me
13 whether, in the e-data room, there are any
14 trading records dating back from the 1980s.
15 I've repeated that request in writing. I've
16 never gotten a response.

17 Now, you know, the trustee wants to
18 take a position he's just an average
19 litigant. He's not an average litigant.
20 He's got an infinite funding source. He's up
21 against people who have been financially
22 devastated and emotionally devastated.

23 And we have a right to at least a
24 level playing field. We've searched the
25 e-data room. I'm going to ask Greg, who

1 spent a lot of time on the e-data room, to
2 tell you how it's organized, because it's a
3 joke.

4 But the fact of the matter is that we
5 have not been able to find a single trading
6 record from the 1980s. And this goes to the
7 issue of the trustee's contention that there
8 were no trades.

9 Now, if there are trading records or
10 any documents reflecting trading records --
11 they could be FINRA reports. They could be
12 audits that were done by FINRA. They could
13 be the Depository Trust Company
14 communications. There are all different
15 categories of documents.

16 We've had people spend time in the
17 e-data room. They can't find any of these
18 documents, and I can't even get a response
19 from the trustee's counsel on it.

20 THE ARBITRATOR: I guess one potential
21 issue is -- I read all the materials that
22 relate to e-Data Room 1. And one thing I
23 carried away from that is that not all of the
24 materials that were at Madoff either are in
25 e-Data Room 1 or fall within the category of

1 core account documents that were turned over
2 to whoever the account related to.

3 So that there might be trading records
4 that relate to, for example, the
5 market-making side of the business that are
6 not in e-Data Room 1.

7 Do I understand that correctly?

8 MR. JACOBS: Not with that particular
9 example. But the first part of your
10 question, are all BLMIS's books and records
11 in e-Data Room 1, and the answer is
12 absolutely not. The e-Data Room 1 could
13 potentially have as many as -- I don't even
14 want to guess, your Honor.

15 It's not practical, reasonable,
16 feasible or desirable from any perspective of
17 any litigant or any of the Federal Rules of
18 Civil Procedure that govern discovery in
19 these actions to undertake an effort to
20 achieve that.

21 What we have done under the -- under
22 the relevant rules that we are subject to,
23 which is the Federal Rules of Civil
24 Procedure -- and I respectfully disagree with
25 Ms. Chaitman. There's nothing in the SIPA

1 statute that enlarges or expands the
2 trustee's discovery obligations under the
3 rules, nor is there anything in the statute
4 that overrides our claim to work product
5 protection.

6 So that argument is completely a red
7 herring, non sequitur. The over 4 million
8 records in e-Data Room 1, as I mentioned,
9 have been very carefully curated to contain,
10 at a minimum, everything that's feasible.

11 And there are some things that aren't
12 amenable to be put in the data room. And
13 those have been disclosed and are made
14 available by other means, but it contains the
15 bulk of what was considered by our experts
16 who, under relevant court orders, are
17 providing summary reports of the fraud.

18 And the data room was originally
19 conceived as a mechanism to permit rapid
20 disclosure or make available for potential
21 production and transparency all of the
22 evidence that our experts relied upon in
23 determining their conclusions.

24 So that particular order is the
25 November -- I might be getting the date

1 slightly off. I think it's the November 10,
2 2011, litigation procedures order.

3 It says -- Judge Lifland entered an
4 order stating that, given the enormous volume
5 of data at issue potentially in this
6 liquidation, the trustee could provide, in
7 the form of a summary expert report, his
8 conclusions as to the salient relevant
9 issues, one of those being the fraud, and
10 make -- otherwise make available the
11 underlying evidence to all litigants in the
12 data room.

13 That's exactly what we've done.

14 THE ARBITRATOR: Let me cut you short.

15 As to Request No. 1, I understand
16 Ms. Chaitman's SIPA argument, but Judge
17 Bernstein concluded that, in this
18 circumstance, the trustee is no different
19 than the ordinary bankruptcy trustee who does
20 not have enhanced obligations. And even if
21 he does, it seems to me, as I said at the
22 outset, this is classic work product.

23 There's a distinction between making
24 available all of the documents in reasonably
25 accessible form and saying who you

1 interviewed and essentially what you
2 considered important.

3 So to the extent there's a motion to
4 compel with respect to Request No. 1, I'm
5 going to deny it.

6 Let me also -- because it's going to
7 come up in a number of these areas. There's
8 the overarching claim of privilege waiver,
9 Ms. Chaitman.

10 And it seems to me that, generally
11 speaking, judges do not require, and
12 typically parties agree not to require that
13 each side, from the date that a litigation
14 commences or people understand that the suit
15 is about to be filed, that everything be
16 logged on a privilege log.

17 I would imagine that you have not
18 logged and would not want to log all of your
19 communications, to the extent they were
20 written, with your clients from December 2008
21 forward.

22 So I'm not going to find that there
23 was a privilege waiver by not logging post
24 December 11, 2008, documents.

25 Why don't we go on from Request No. 1,

1 then.

2 MS. CHAITMAN: Can we -- since Ted
3 mentioned the trading records, can we resolve
4 the trading records? Because, again, what
5 Ted is saying is that the trustee selected
6 what would be put in the e-data room, and
7 we've never gotten an answer.

8 THE ARBITRATOR: I saw you sent at
9 least two e-mails.

10 MR. JACOBS: Yes.

11 THE ARBITRATOR: And I think there
12 should be -- notwithstanding the fact that,
13 from the trustee's perspective, there's this
14 extensive guide to what is in the data room,
15 I think it has to be responsiveness to
16 reasonable requests. And this is sort of
17 binary. It's yes or no.

18 MR. JACOBS: I can answer this
19 question I think rather easily.

20 So first and foremost, all of the
21 trading records we have currently identified
22 are in the data room. They're in the data
23 section under DTC.

24 Now, Ms. Chaitman served her own
25 subpoena on DTC for those exact records. We

1 obtained them in part from a Rule 2004
2 subpoena and part from what we restored on
3 the BLMIS DTC terminal, in part from
4 documents we got from the government.

5 We compiled all of that. It is all
6 available in a specifically labeled folder
7 called DTC. There are also folders in that
8 exact same section that are labeled "FINRA."
9 All of the categories of documents you're
10 looking for, as we've written you in letters
11 and attempted to explain to you many times in
12 the past, are actually in their own folders
13 in the data room so they can be -- they are
14 accessible that way.

15 Now, with respect to earlier periods
16 of the fraud, that is an allegation and an
17 issue that you recently raised in the PW
18 context pursuant to Mr. Madoff's testimony.
19 Even though it was outside the scope of the
20 order allowing that testimony, the judge has
21 now allowed a second deposition on that
22 subject.

23 We will look for and have been looking
24 for stuff -- any additional stock trading
25 records as to earlier periods of time in

1 addition to what is currently in the data
2 room. To the extent we find them or restore
3 them or can obtain them from DTC or any other
4 source, we will produce them to you and we
5 will put them in the data room. Absolutely.

6 MS. CHAITMAN: But see --

7 THE ARBITRATOR: Let me rephrase that
8 for a second and see whether it's correct.

9 That to date, except to the extent
10 that they may be in DTC records or FINRA
11 records in that data room, you haven't found
12 any other records?

13 MR. JACOBS: We're currently looking.
14 Because it's an active issue that
15 Ms. Chaitman has raised in the PW context in
16 discovery. There's a deposition scheduled
17 for December 20th where Mr. Madoff will give
18 additional testimony as to those issues.

19 And clearly we are going to want to
20 respond, if we can to meet with the debtor's
21 books and records that are available. So we
22 are actively looking for that material.

23 THE ARBITRATOR: December 20th is --

24 MS. CHAITMAN: Next Tuesday.

25 THE ARBITRATOR: When are you going to

1 get back to --

2 Off the record.

3 (Discussion off the record.)

4 THE ARBITRATOR: Back on the record.

5 So when are you going to respond to
6 Ms. Chaitman's request in that regard since
7 the deposition's next Tuesday?

8 MR. JACOBS: Well, anything that we
9 would use in the deposition we will produce
10 prior to the deposition, if there are items.

11 THE ARBITRATOR: But it's --

12 MS. CHAITMAN: You see what they're
13 doing, Judge. First of all, I've asked for
14 this for two months.

15 And the second is, they're going to
16 give me what they want to use and not what
17 they have, and this is just not discovery.

18 MR. JACOBS: We've given Ms. Chaitman
19 everything we have, and that's in the data
20 room. So there's no dispute about -- there's
21 nothing to compel.

22 THE ARBITRATOR: I thought I heard you
23 say earlier that you're continuing to look
24 for other documents.

25 MR. JACOBS: That's right. And my

1 ability to answer as to a date certain for
2 production will depend upon our success in
3 identifying that, if any. And I don't know
4 the answer to that.

5 There's -- as we disclosed in
6 discovery responses, BLMIS maintained a
7 warehouse. There are multiple pieces of
8 media in that warehouse. There are hard copy
9 documents. Much of it has been scanned,
10 restored and made available in the data room,
11 but there might be -- there might be material
12 that's on a tape or a piece of media
13 somewhere that we haven't looked at yet, and
14 that process takes a long time.

15 But before -- we shouldn't be required
16 to have to look at every piece. There has to
17 be an articulated -- there should at a
18 minimum be an articulated basis to the need
19 for it under Rule 26's proportionality
20 standards.

21 THE ARBITRATOR: Well, Mr. Madoff says
22 that he was running, even on the investment
23 advisory side, a legitimate business with
24 these convertible securities up until
25 sometime in the '90s; correct?

1 MR. JACOBS: When you have an
2 opportunity to read Mr. Dubinski's report,
3 you'll see that our expert disagrees --

4 THE ARBITRATOR: Okay.

5 MR. JACOBS: -- with that self-serving
6 testimony. And, furthermore, that it's not
7 supported by any of the voluminous effort
8 over long periods of time that he did
9 consider and that has been made available.

10 THE ARBITRATOR: Okay. But you're
11 saying that you are attempting to find --
12 haven't phrase it this way, but you're saying
13 you're attempting to find records which, if
14 reviewed, potentially could support
15 Mr. Madoff's view of the world; is that
16 correct?

17 MR. JACOBS: Yes. We are -- well,
18 not -- it's not specifically how I would
19 phrase it, but we are looking for --
20 Ms. Chaitman has requested actual stock
21 trading activity and records demonstrating
22 actual trading stock activity, whether it be
23 in House 5 or elsewhere, for those earlier
24 periods of time, which Mr. Madoff's testimony
25 has now opened the door to. So whether it

1 refutes or supports that testimony, we will
2 produce it if we can identify it.

3 THE ARBITRATOR: And I think as a
4 practical matter, unless there's some reason
5 why this can't occur, should that be made
6 available, and it doesn't sound like under
7 any conceivable scenario it could occur
8 before next Tuesday, the possibility exists
9 that Mr. Madoff may be deposed a third time.

10 MR. JACOBS: That --

11 MS. CHAITMAN: Judge, can I point
12 something out?

13 THE ARBITRATOR: Yeah.

14 MS. CHAITMAN: DiPascali pled in 2010,
15 I believe. Madoff pled in 2009. They
16 both -- and you'll see the plea because they
17 both said the same thing. The first words
18 out of DiPascali's mouth were "In the early
19 1990s, we started a fraud." So this is not a
20 new issue.

21 And what Ted has really said to you,
22 in substance, is that they put in the e-data
23 room what supports their expert's report,
24 which is --

25 MR. JACOBS: That's not true.

1 MS. CHAITMAN: I didn't interrupt you
2 and I'd appreciate it if you don't interrupt
3 me. I'd like to be able to finish.

4 MR. JACOBS: Please finish.

5 MS. CHAITMAN: So they have a world
6 view of the case, which they're entitled to,
7 possibly. And they won't produce documents
8 that are inconsistent with that world view.

9 And this document request is dated
10 August 5, 2016. So they've had more than
11 enough time to look for the documents; they
12 just don't want to produce them.

13 And what's going on here is that
14 they've sold a certain view of what happened
15 here. And I don't believe it's accurate.
16 And they're doing everything they possibly
17 can to prevent the truth from coming out.

18 MR. JACOBS: May I respond to that,
19 your Honor?

20 THE ARBITRATOR: Before you --

21 MR. JACOBS: It's so outrageous, I
22 can't leave it unresponded to.

23 THE ARBITRATOR: Okay. But in
24 addition to the documents that are in e-Data
25 Room 1, and I'm focusing on trading records,

1 there's an inventory, I assume, that the
2 trustee prepared of the rest of the universe.

3 MR. JACOBS: In a sense. We have --
4 we've endeavored to painstakingly track all
5 of the items that are in the warehouse that
6 we inherited from BLMIS. But documents, your
7 Honor, may exist on microfiche, they may
8 exist on a piece of hard media, they may
9 exist on a floppy disk --

10 MR. HUNT: They may be in a box in a
11 warehouse --

12 MR. JACOBS: We don't have -- we don't
13 have documents that are readily accessible
14 and restored, that anyone to date that has
15 looked at, that haven't been made available
16 to our experts or to Ms. Chaitman.

17 It is simply an outrageous statement
18 to assert that the trustee is cherry-picking
19 the evidence available to him and keeping
20 from the defendants items that may hurt, a
21 narrative that he constructed out of thin air
22 to suit some purpose.

23 Our goal here is to recover funds for
24 the customer fund under the laws afforded to
25 the trustee for which he's tasked to do so.

1 Our objective is first and foremost to get it
2 correct. We don't want to sue anyone who
3 doesn't owe us money. We don't want to
4 recover a single dollar that isn't
5 appropriately recovered under the relevant
6 statutory framework.

7 Ms. Chaitman has all of the documents
8 that are readily available, have been
9 restored and have been considered, good or
10 bad, to the trustee's case currently.

11 Now, we may undertake additional
12 restorations. I don't know. I can't speak
13 definitively about that. Ms. Chaitman is
14 actively litigating and challenging our
15 expert conclusion as to the earlier periods
16 of time.

17 We never intended to credit or rely
18 upon the testimony of Bernard Madoff,
19 frankly. He committed the world's greatest
20 Ponzi scheme. I don't think his testimony is
21 reliable or should be credited in any sense
22 or fashion. However, the judge has allowed
23 it.

24 Now that we're going down that road,
25 we will endeavor to see if, on some floppy

1 disk somewhere in a box in a warehouse, there
2 might be early stock trading records from
3 periods predating what we currently have.

4 So you know, all of the stock trading
5 records that we do have and we have made
6 available were obtained because we went out
7 in the world and subpoenaed them and
8 diligently and aggressively tried to find
9 them wherever they may exist.

10 Ms. Chaitman did too. The DTC is
11 under a regulatory framework where it was, by
12 law, required to keep records for a certain
13 number of years. That's why they had
14 documents back through 2002 which they
15 produced to us and we in turn produced to
16 Ms. Chaitman.

17 We also scoured, like I said, all of
18 the DTC terminal that was active and live by
19 BLMIS as of the time we took custody of it.
20 We restored all of that data. We put it in
21 the data room.

22 We also subpoenaed the SEC. We
23 cooperated -- they cooperated with us. They
24 shared with us the fruits of their similar
25 investigation.

1 All of that material, wherever we
2 could find it, good or bad, we've made
3 available and we provided to our experts for
4 consideration.

5 THE ARBITRATOR: Well --

6 MR. JACOBS: So that's the lay of the
7 land today.

8 As discovery unfolds in the PW matter
9 and now that it is switched over to the
10 adversary proceeding and we gear up for
11 potential trial on the fraud, as Judge
12 Bernstein has invited the parties to
13 consider, if we can find and identify
14 additional materials that are responsive to
15 this issue, we will make it available
16 regardless of whether it hurts or helps us
17 and, as necessary, our experts -- we'll
18 provide it to our experts as well for them to
19 appropriately supplement any relevant report
20 that's impacted.

21 THE ARBITRATOR: Having dealt with DTC
22 records in the past and because of their
23 continuous net settlement rules, my take on
24 this is that the DTC records, in terms of
25 what Ms. Chaitman's trying to prove and

1 you're trying to disprove, will probably end
2 up being gibberish, but --

3 MS. CHAITMAN: They only go back to
4 2002.

5 THE ARBITRATOR: Okay. But even if
6 you had them back further, there are a lot of
7 complicating factors. I had that in another
8 case. But --

9 MR. JACOBS: That issue was precedent
10 of later requests where Ms. Chaitman has
11 asked us to match individual trades for
12 customers with House 5 trading activity. And
13 the information doesn't work that way.

14 THE ARBITRATOR: But let me -- I
15 recognize that we're dealing with volume
16 that's far beyond anything certainly I've
17 dealt with and probably anybody in the room
18 has dealt with previously.

19 Is there an inventory of files that
20 can be produced? I suppose that's work
21 product, but there's nothing particularly
22 secret about that. It may be annotated in
23 which event I would suggest the unannotated
24 version of it be produced.

25 But I do not want -- since it is going

1 to take you some time, as you said, to look
2 for what may not even be there, but --

3 MR. JACOBS: Well, my objection to
4 producing anything that may exist is exactly
5 what you've identified, is that it's work
6 product, but even before that, there has to
7 be an articulated need for it that no other
8 discovery from a different source can fill.

9 I mean, it has to -- the cost and
10 burden of us having to make -- prepare that
11 in a way that it could be produced without
12 waiving work product in a producible form --
13 what purpose will it serve, I guess is the
14 question? I mean, I just -- what is the
15 need? What's the proportionality
16 consideration that would demand its
17 disclosure in the context of this or any
18 given request?

19 I can't in my head conceptualize --
20 after considering the effort that our team
21 and that I personally have been involved in
22 over the course of years and spending
23 millions of dollars to make all of this
24 information transparent and available in
25 every single case, on all of the case-wide

1 issues, whether it be fraud or insolvency,
2 which, arguably, isn't even -- the latter
3 isn't even an element in these claims, but
4 fraud certainly is.

5 This is my answer to all of these
6 requests, is, how can any incremental step
7 further in light of everything that we've
8 already done -- how can that possibly be
9 proportionate to the needs of this case or
10 even all of Ms. Chaitman's cases taken as a
11 whole or even all the good-faith adversary
12 proceedings taken as a whole? I mean,
13 there's nothing more for us that we can
14 disclose.

15 THE ARBITRATOR: Is it correct that
16 except for third-party records that may have
17 been subpoenaed, you and your team have not
18 encountered any pre 1990 records of actual
19 trading that relate to the investment
20 advisory customers?

21 MR. JACOBS: We have never -- I have
22 never personally and I don't know of any
23 record ever seen by anyone on our team that
24 shows actual stock trading for a House 17 or
25 an IA, investment advisory, customer, no.

1 MS. CHAITMAN: But, Judge, that
2 ignores the issue. Because Madoff testified
3 that there was no House 17 before 1992. This
4 is a fiction of Mr. Picard and his expert.
5 It was all one unit.

6 It was one company and he said all the
7 trading in the investment advisory customer
8 accounts was trading with Madoff. In other
9 words, he had -- he was doing trades equal to
10 10 percent of the daily volume on the New
11 York Stock Exchange. So he had a huge
12 inventory of trades -- of securities.

13 He would transact trades with the IA
14 customers. So it's not -- it's not that
15 you're looking for House 17 trades. We
16 want -- we want the records in the 1980s,
17 before 1992, of all of the Madoff trades.
18 And the trustee inherited those records, to
19 the extent they exist. And there's no other
20 place we can get them.

21 And they disprove -- just to
22 understand the significance of this, if, in
23 fact, both DiPascali and Madoff are telling
24 the truth, then the trustee has to
25 recalculate every single claim. Because he

1 discredited claims, he disallowed claims on
2 the basis that there was no net equity
3 because he didn't recognize any trades going
4 back to the 1980s. So --

5 THE ARBITRATOR: Also, you would argue
6 then that the Ponzi presumption --

7 MS. CHAITMAN: Of course. You have
8 to --

9 THE ARBITRATOR: -- applies.

10 MS. CHAITMAN: -- yes. So --

11 THE ARBITRATOR: Let me modify my
12 question to Mr. Jacobs.

13 And if we take out House 5, House 17,
14 apart from the DTC and FINRA and other
15 third-party records that I gather are in the
16 e-data room, have you or, to your knowledge,
17 has your team found pre 1982 trading records?

18 MS. CHAITMAN: 1992.

19 THE ARBITRATOR: 1992.

20 MR. JACOBS: Not that I can confirm or
21 know of. We are looking. And I'm not
22 directly involved with that effort, so it's
23 certainly information I can find out. And
24 we're trying very hard to get it.

25 THE ARBITRATOR: And understanding

1 that it's perhaps looking for a needle in a
2 haystack, it seems to me there's a need to
3 come up with an end date by which you'll
4 respond saying either you found something or
5 you haven't and, adding into that, the
6 understanding that even given the size of the
7 Madoff fraud as a whole, it would not be
8 sensible to restore every microfiche and look
9 through it, but there has to be a good-faith
10 effort to look.

11 MR. JACOBS: Right. And we are
12 conducting that investigation right now.
13 We're absolutely conducting that
14 investigation in direct response to
15 Ms. Chaitman's request.

16 THE ARBITRATOR: But there has to be
17 some end date.

18 MR. JACOBS: My only -- my only
19 hesitation in providing one is that -- I'm
20 pretty confident that if there is anything
21 that we can find that contains these type of
22 records from an earlier period, it's going to
23 be on media that we're going to have a
24 challenge restoring.

25 So it might be microfiche, microfilm,

1 some type of backup tape that is for a
2 computer program or software or hardware that
3 doesn't exist any longer.

4 So we have to -- when we were dealing
5 with items like that, we have to send it out
6 to a vendor to see if they can restore it or
7 give us a quick peek to kind of try to give
8 us a sense if it would be fruitful for a
9 fuller restoration. All of this costs a lot
10 of money, so we weigh the balance of -- all
11 of those factors have to be considered and I
12 think are fairly considered under
13 proportionality analysis.

14 But the bottom line, for the purposes
15 of your question, is it takes time.

16 THE ARBITRATOR: Okay. But let me
17 rephrase it and perhaps in terms of this
18 question: How long will it take you to make
19 a good-faith effort to determine whether
20 there are such pre 1992 trading records not
21 previously produced?

22 Putting aside how long it will take to
23 produce them, but to determine whether there
24 are such records.

25 MR. JACOBS: My answer is the same,

1 your Honor, because I can't -- I mean, if I
2 send out a microfilm tomorrow, I don't know
3 how long that's going to take or what
4 information I might even -- it's really --
5 we're dealing with uncharted territory here
6 in terms of both discovery and e-discovery.
7 It's not as simple as me doing a search in a
8 database and being able to say, oh, I found
9 three things I can produce tomorrow, but --

10 THE ARBITRATOR: There has to be, at
11 least for that second inquiry, some deadline,
12 even if it's adjusted, even if -- even if it
13 then requires a substantial effort down the
14 road having determined, by looking at one
15 microfiche, that there are potentially
16 records and then dealing with the fact that
17 there are a hundred thousand microfiches to
18 deal with.

19 There's got to be some end date so
20 Ms. Chaitman knows that the effort will not
21 end 12 years after the last Madoff case.

22 MR. JACOBS: Right. Well, I will have
23 to talk to almost literally an army of people
24 to get that information for you, including
25 with the core professionals, outside vendors

1 and the team that's --

2 THE ARBITRATOR: So suppose I say that
3 you give me a response to that second
4 question within a week?

5 MR. JACOBS: I can endeavor to do
6 that, your Honor. And at least within a
7 week's time, I can give you an update as to
8 why I can't -- to where the status is and why
9 I can't be more specific.

10 THE ARBITRATOR: But understand that
11 I'm going to set some date, recognizing it
12 may have to be adjusted, but -- so that
13 there's some date, and also recognizing that
14 potentially there may be a third deposition
15 of Mr. Madoff that Ms. Chaitman takes if
16 there is such information.

17 MR. JACOBS: Okay. I understand.

18 THE ARBITRATOR: I think that's the
19 best I can do for you, Ms. Chaitman.

20 MS. CHAITMAN: I appreciate that. And
21 I also think that we're entitled to a
22 description of all of the documents that the
23 trustee chose not to put in the e-data room.
24 Because I'm concerned that he put into the
25 e-data room the documents that support his

1 view of this case and did not put into the
2 e-data room documents that he did review
3 which are inconsistent with the positions
4 he's taken.

5 So I think that we're entitled to a
6 list. There's a warehouse on Long Island in
7 such-and-such a town and it contains X and we
8 didn't put -- they must have all this.

9 THE ARBITRATOR: Except I gather they
10 have it annotated in such a way that it's
11 work product --

12 MS. CHAITMAN: Let them show it to
13 you.

14 THE ARBITRATOR: And your assumption
15 is one that I'm not willing to buy into. The
16 trustee and both sides and every litigant has
17 an ethical obligation. And I assume that
18 even if you don't like the way in which the
19 trustee is going about -- is functioning,
20 including claw-back actions against people
21 who you view as victims, I have no basis to
22 assume that they're proceeding dishonestly.

23 In terms of me looking at the
24 inventory, it probably is almost as useless
25 as you looking at the inventory. And I'm not

1 saying that disparagingly. Because it's
2 going to be extraordinarily lengthy and
3 probably not terribly informative. Because
4 if it were informative, Mr. Jacobs and his
5 colleagues could have said, oh, we found, you
6 know, this treasure trove of documents and
7 now the issue is how long it's going to take
8 to restore it.

9 MR. JACOBS: And, your Honor --

10 THE ARBITRATOR: I take it that you
11 can represent to me that there's nothing on
12 the face of the inventory that reflects
13 pre 1992 trading records that are not yet in
14 the e-data room.

15 MR. JACOBS: Absolutely not.

16 THE ARBITRATOR: You're agreeing with
17 me.

18 MR. JACOBS: Yes, there's nothing
19 there -- no, there's nothing of that nature.

20 And, your Honor, the request that
21 Ms. Chaitman is making is absolutely -- for
22 you to order that would be absolutely
23 unprecedented. And without a particularized
24 articulation of the need or what is missing
25 from the over 4 million, 4 million,

1 records --

2 THE ARBITRATOR: The short answer is
3 I'm not going to require that. And I think
4 we've exhausted Request No. -- the discussion
5 of Request No. 1.

6 Is Request No. 2 next?

7 MS. CHAITMAN: Yes. Thank you.

8 We've asked for -- obviously one of
9 the major issues in the case is the
10 reliability of the records. And we've asked
11 for the trustee to disclose every single
12 factual error he's found in the books and
13 records. Because, again, that goes to the
14 reliability of the records.

15 We've been able to nail down some of
16 this information in the profit withdrawal
17 litigation where, in fact, the trustee's own
18 experts have conceded that there are all
19 kinds of inconsistencies in the records, but
20 outside the profit withdrawal litigation,
21 which we think we're entitled to the same
22 disclosures.

23 MR. JACOBS: May I respond, your
24 Honor?

25 THE ARBITRATOR: Please.

1 MR. JACOBS: In the Wilenitz case
2 that's before us today, the defendants have
3 conceded that the cash activity for the
4 accounts that they opened in 2003 are
5 correct. So from both a relevance and a
6 proportionality perspective, this request and
7 the one that follows, which is -- which is
8 similar, are completely outside the universe
9 of what could even remotely be, under
10 conjecture or speculation, possibly
11 considered relevant proportionate to the
12 needs of this case.

13 Judge Bernstein has characterized the
14 adversary proceedings as strict liability
15 actions; you got the money or you didn't.
16 You got the money, you have to pay it back
17 because it belongs to somebody else, if the
18 trustee can prove that with the books and
19 records related to the specific account.

20 The books and records of other
21 customers, beyond the accounts that we sued
22 upon in any given case, are not relevant on
23 that issue to these claims.

24 THE ARBITRATOR: Well, Wilenitz, which
25 we are pronouncing several different ways, is

1 a unique case because I guess it's --
2 Mrs. Wilenitz has that statement saying, I've
3 compared it to my records and they agree.

4 MR. JACOBS: Right.

5 THE ARBITRATOR: So I agree with you
6 as to Wilenitz, it's irrelevant, as Judge
7 Bernstein said. But there are lots of
8 clients that Ms. Chaitman has. And even
9 though formally the motion only deals with
10 Wilenitz, conceptually if the books and
11 records regarding deposits and withdrawals
12 are woefully inaccurate, that it seems to me
13 is relevant.

14 MR. JACOBS: And this --

15 THE ARBITRATOR: In part --

16 MR. JACOBS: In this particular case?

17 THE ARBITRATOR: Not in Wilenitz. In
18 some other case.

19 MR. JACOBS: Right.

20 THE ARBITRATOR: In Case No. 3.

21 But the profit withdrawal report and
22 hearing will, in part, deal with that; is
23 that correct?

24 MS. CHAITMAN: Only with respect to
25 the profit withdrawal issue, not with respect

1 to other issues.

2 MR. JACOBS: Right.

3 MS. CHAITMAN: So the thing is that
4 the issue of -- I'm sure you've had
5 experience with this on business records
6 exception, can you admit records of a
7 fraudster? Only if they have indicia of
8 reliability.

9 So this is what this interrogatory is
10 going to. If there is evidence that the
11 records -- the whole set of records do not
12 carry those indicia of reliability, then
13 that's a reason that they shouldn't be
14 admitted.

15 MR. JACOBS: Your Honor, you've just
16 seen in three cases just today Ms. Chaitman
17 has conceded the reliability as to the cash
18 activity of the account. She's made no
19 showing that the books and records of the
20 debtor are not 100 percent reliable with
21 respect to cash activity in this case or any
22 other case.

23 On that basis, an order compelling the
24 trustee to conduct an investigation that is
25 essentially a wild goose chase looking for a

1 needle in a haystack across every single
2 customer account that existed at any point in
3 time --

4 THE ARBITRATOR: Well, but --

5 MR. JACOBS: -- has no rational
6 bearing to the relevance of the claims and
7 defenses in this case. The request is asking
8 for us to investigate every single customer
9 statement for all periods of time in every
10 single case.

11 THE ARBITRATOR: I read it slightly
12 differently. It's not in the present or
13 future tense; it's in the past tense.

14 It's "every error you found." And
15 there's one person who said the records were
16 inaccurate as to reflecting two \$25,000
17 withdrawals where the customer said it was
18 only one, and maybe that's right, maybe
19 that's wrong, and maybe you have or have not
20 investigated that to date.

21 MR. JACOBS: Right.

22 THE ARBITRATOR: And I recognize that
23 we're dealing with tens of thousands of
24 records. But it's not requiring that you go
25 out and do that now; it's asking that you

1 identify those instances you found in the
2 past.

3 I'm not saying that that's not a
4 considerable task and potentially an unduly
5 burdensome task, but it's narrower than the
6 way you're reading it, to my mind.

7 MS. CHAITMAN: And --

8 THE ARBITRATOR: Let me --

9 MR. JACOBS: What's the
10 articulation --

11 THE ARBITRATOR: Let me put it in a
12 criminal context. And if I'm using case law
13 that you're not familiar with, tell me and I
14 won't go down that road.

15 But if this were the Madoff criminal
16 case and you were the prosecutor saying,
17 everything Madoff did was a fraud and I can
18 prove it by introducing these records of his
19 business under the business records
20 exception, and the witness we're getting on
21 the stand, your expert or somebody else to
22 say these records are pristine, they
23 accurately reflect everything, under Brady,
24 you'd have an obligation as a prosecutor to
25 disclose, well, no, there were these ten

1 instances where the records were inaccurate.

2 MR. JACOBS: Right.

3 THE ARBITRATOR: So Ms. Chaitman, in
4 effect, is looking for Brady material.

5 MR. JACOBS: Right, but that's not the
6 standard that governs discovery in this civil
7 action. The standard is Rule 26, which
8 cabins relevance by -- with proportionality.
9 The discovery sought must be relevant and --
10 it's not "or" -- and proportionate. And
11 proportionate is adjudged by the needs of the
12 case.

13 In this case, we have represented --
14 in this case with these defendants and these
15 accounts, we have not found any inaccuracy in
16 the records. In our -- in Greenblatt and
17 Lisa Collura's global reports, which we will
18 issue in this case and which we issue in
19 every case, they do a global reconciliation
20 of the customers' statements and find with a
21 near 100 percent certainly that, with respect
22 to wherever independent verification is
23 available, those records are reliable and
24 accurate with nearly 100 percent of the time,
25 which is I guess sort of the flip of what

1 you're asking us to do -- or the request is
2 asking us to do.

3 My question would be, how can I
4 possibly, with a team of a hundred attorneys
5 and numerous -- dozens of consultants, over
6 an eight-year period go back and reconstruct
7 every instance of every time we found a typo
8 on a page that may, quote, qualify as an
9 error, which is undefined and vague here?
10 That would take us weeks, months, years to do
11 for what utility or benefit?

12 THE ARBITRATOR: I agree with you that
13 somebody told me, probably off the record,
14 that there were 64,000 customers.

15 MS. CHAITMAN: I just told you that.

16 THE ARBITRATOR: That there's no need
17 to either prospectively or retrospectively
18 identify every error in the records that
19 relate to 64,000 customers.

20 But at trial, to the extent there is a
21 trial, Ms. Chaitman, the trustee is only
22 going to offer the business records that
23 relate to these 92 customers of yours. Judge
24 Bernstein firmly took the view that even if
25 there are gross inaccuracies as to other

1 customers, that that's irrelevant.

2 I understand you say that that would
3 call into question the accuracy of the
4 records as a whole. This is not the
5 traditional case where somebody's going to
6 get up and say, I'm the treasurer of Bernard
7 Madoff Securities and the records are
8 accurate. Although I suppose maybe there's
9 somebody who was prosecuted criminally, but
10 could so testify, saying that the records of
11 the fraud are accurate.

12 But why should I require that Request
13 No. 2 be answered except as to your 92
14 clients? And then the same way you're having
15 trouble getting information out from your
16 expert or accountant or whoever it is who's
17 doing the summary information about taxes, I
18 think it was taxes, here there's going to be
19 an expert report which will, to the extent
20 there are errors or inconsistencies, disclose
21 items; is that accurate?

22 MR. JACOBS: I'm sorry. I'm not sure
23 I understand the proposition. There will be
24 an expert report --

25 THE ARBITRATOR: There's going to be

1 one or more experts who, for Mr. DiGiulian,
2 to pick somebody who doesn't concede that the
3 records correspond to his records -- for the
4 DiGiulian client of Ms. Chaitman, there's
5 going to be one or more experts who are going
6 to say, we looked at the books and records
7 that relate to this defendant.

8 MR. JACOBS: Right.

9 THE ARBITRATOR: They show the
10 following.

11 MR. JACOBS: Right.

12 THE ARBITRATOR: And we have not found
13 any inconsistent records.

14 MR. JACOBS: That's correct. And I
15 think the way I would put that is that we
16 will put forth proof on our affirmative
17 obligation and -- which is our burden
18 supporting all of our claims. And I can tell
19 you that -- I can represent for the record
20 right now that with respect to all of
21 Ms. Chaitman's clients, we have found no
22 errors or we wouldn't have sued them. Or we
23 wouldn't have -- we would have disclosed that
24 Bernard Exhibit B would reflect a correction
25 of that error.

1 There are no errors in any of
2 Ms. Chaitman's cases that we are aware of.
3 Now, discovery might yield a different
4 outcome, which is why we affirmatively asked
5 for all the discovery we've been discussing
6 earlier in the day.

7 If there are transactions or deposits
8 or withdrawals or other factual issues that
9 are disputed and Ms. Chaitman has proof of
10 that, on behalf of her clients, she has an
11 obligation to produce it. And we will
12 consider it and either amend the claim
13 appropriately or we will litigate it in
14 court, and the judge will decide whose proof
15 carries the day.

16 But we shouldn't have to -- but
17 Ms. Chaitman must, under Rule 26 and under
18 the relevant law, articulate a basis to
19 challenge our proof that's specific and
20 not -- and not a fishing expedition across
21 unrelated, irrelevant other customers whose
22 deposits and withdrawals aren't at issue in
23 this case.

24 THE ARBITRATOR: What I'm going to do
25 is limit Request No. 2 to Ms. Chaitman's 92

1 clients. I gather that, thus limited, your
2 response is likely to be, we haven't found
3 such errors.

4 MR. JACOBS: Right.

5 THE ARBITRATOR: It also follows that
6 at the expert discovery stage in each of her
7 cases, you may find some errors. You may
8 not, but it's conceivable that you may find
9 some. And granted that will occur at the
10 expert discovery stage rather than the fact
11 discovery stage, but I will reserve decision
12 as to whether that permits her to then seek
13 further discovery.

14 MR. JACOBS: Okay.

15 MS. CHAITMAN: I would like just to
16 point out --

17 MR. HUNT: Can I make one -- sorry to
18 interrupt.

19 Are you done, moving on to the next
20 one?

21 MS. CHAITMAN: No, I was going to say
22 something about this.

23 MR. HUNT: I was going to make -- for
24 the record, DiGiulian actually has stipulated
25 to the accuracy and --

1 THE ARBITRATOR: I was just using a
2 name.

3 MR. HUNT: Good.

4 THE ARBITRATOR: The Maas account. I
5 wasn't trying to be specific.

6 MR. HUNT: I didn't think so, but I
7 didn't want an inconsistent record.

8 MS. CHAITMAN: The -- in fact, one of
9 my clients extraordinarily had records going
10 back and had an original check that Madoff
11 had sent her that she hadn't cashed. So her
12 account was charged with that amount, but she
13 hadn't actually withdrawn it. So that was an
14 error. And --

15 MR. JACOBS: That's not an error in
16 our books and records. That's back --

17 MS. CHAITMAN: It showed up as a
18 withdrawal on her statement.

19 THE ARBITRATOR: Depends on the
20 accounting system you use, I suppose, and
21 that's --

22 MS. CHAITMAN: But that's the kind of
23 thing. If they don't count that as an error
24 when a check is not cashed --

25 MR. JACOBS: How would we know if the

1 check was cashed or not unless Ms. Chaitman
2 produces the discovery which we asked for,
3 which are those bank statements and
4 confirmation --

5 THE ARBITRATOR: Really the request is
6 list every single factual error of which you
7 are aware. Your point is you were unaware of
8 that --

9 MR. JACOBS: Right.

10 THE ARBITRATOR: -- despite a
11 good-faith effort.

12 MR. JACOBS: It's also --

13 THE ARBITRATOR: And I think -- you've
14 been harping on proportionality. I think
15 I've dealt with that by limiting the universe
16 to the 92 accounts.

17 MR. JACOBS: Okay.

18 THE ARBITRATOR: And if at the expert
19 discovery stage, it turns out that there are
20 a number of errors, then, as I said, I'll
21 deal with that at that stage.

22 MR. JACOBS: Okay.

23 THE ARBITRATOR: Okay. What's next?

24 MR. JACOBS: I think that same ruling
25 would apply to --

1 THE ARBITRATOR: 2, 3 and 5?

2 MR. JACOBS: Let me --

3 THE ARBITRATOR: Ms. Chaitman had 2, 3
4 and 5 as a page, basically.

5 MR. JACOBS: Right. I'm not sure that
6 I even can understand Request 3 as drafted.
7 I don't know what this means, to list every
8 single factual error asserted by any Madoff
9 or BLMIS customer in their statements. How
10 does a customer assert an error in their -- I
11 just think -- I don't understand what this
12 request is seeking.

13 MS. CHAITMAN: Let me explain.

14 What I meant to request is that if
15 Mrs. Jones asserts that on her December 31,
16 2001, statement there's an error and she
17 brings that to your attention and she's
18 correct, I'm asking you to produce the
19 documents that indicate that.

20 THE ARBITRATOR: Well, I -- there's
21 two ways in which this could be read. One
22 is -- well, building on what Ms. Chaitman
23 said, the bringing it to the attention of
24 somebody could be in realtime such that
25 somebody in 2007 wrote a letter to Madoff and

1 said, I never cashed that check so your
2 accounting is wrong.

3 Or it could be in connection with the
4 bankruptcy proceeding. In connection with
5 the bankruptcy proceeding, obviously you know
6 if somebody has asserted such a contention,
7 Ms. Chaitman. So really it's the sort of
8 realtime complaints.

9 And, again, I'm going to limit that to
10 the 92 accounts at issue.

11 MR. JACOBS: Thank you, your Honor,
12 but at this juncture, I really do feel
13 compelled to assert for the record that we
14 object to the fact that we appear to be
15 having a mini hearing here as to the
16 admissibility of the trustee's records.

17 All of these records are proof of
18 claims that are going to be litigated, and a
19 court of law is going to determine if they
20 have errors or not. This isn't something --
21 an error is -- what does that mean? Does
22 that mean do I have to disclose an error if I
23 lose in court? Do I have to disclose -- is
24 it an error if a defendant denies it in her
25 answer? Is it an error if competing, but

1 unresolved factual evidence is produced?

2 These requests are simply nonsensical.

3 And I have to say, notwithstanding your
4 order, respectfully, on number 2, with
5 respect to number 2 and 3, it's not my burden
6 to prove that these records are correct
7 before I have to prove them.

8 And it's not my burden to make
9 determinations as to whether a court of law
10 is going to determine that my proofs are
11 legally sufficient or not before those
12 determinations have been made.

13 THE ARBITRATOR: Nor am I requiring
14 that. And it's not a prospective
15 undertaking; it's your knowledge -- when I
16 say "you," I mean the trustee -- as of today.
17 So if, for example, in the 92 accounts,
18 you're aware today that there was some
19 accounting miscalculation, you would have to
20 produce that information to Ms. Chaitman.

21 As I said, as a practical matter,
22 you're likely only to get to that stage when
23 I guess it's -- Collura opines about a
24 particular account.

25 MR. JACOBS: Right.

1 THE ARBITRATOR: And what the sequelae
2 of that would be is something I reserve
3 decision on. So I think you're worrying
4 about something that hasn't happened and may
5 not happen.

6 MR. JACOBS: I guess I'm still stuck
7 on this concept of error. I mean, our -- we
8 construct our Exhibit Bs based on what we
9 believe to be true and correct based on our
10 investigation.

11 THE ARBITRATOR: So your --

12 MR. JACOBS: It's a combination of
13 account statements, bank transfer records,
14 third-party records and other materials. So
15 we are not going --

16 THE ARBITRATOR: And if --

17 MR. JACOBS: -- pursue, for example,
18 on a withdrawal that we don't have a
19 good-faith basis to believe occurred, whether
20 the check was cashed or not, whether we're
21 right or not, whether -- it didn't happen.

22 Because we painstakingly constructed
23 each of our complaints with respect to each
24 account and our net equity analysis, with the
25 help of our experts and consultants, in

1 making determinations on which claims to
2 pursue and which ones not to pursue.

3 THE ARBITRATOR: Which is my point,
4 that your answer may well be, now that I've
5 narrowed it to the 92 accounts, we are aware
6 of no such errors at this time.

7 MR. JACOBS: Okay.

8 THE ARBITRATOR: Maybe there are some
9 that you're aware of, but it's equally
10 plausible that you're not aware of any such
11 errors.

12 So that was 3. And 5 is the one --

13 MR. JACOBS: The number 5 we discussed
14 at length with Judge Bernstein, and he agreed
15 that we find this nonsensical. I don't know
16 what "riddled with fraud" means, if this is a
17 challenge to the admissibility of our records
18 that's not currently before your Honor and
19 not properly ruled upon at this juncture.

20 What we have maintained is that -- and
21 what our experts will maintain, as we've
22 discussed at length today, is that the cash
23 activity reflected in the customer statements
24 is accurate and reliable, but the stock
25 trading activity included in those documents

1 and others that were provided to customers
2 reflect fraudulent trading -- purported
3 trading activity that never occurred.

4 So that may be where this "riddled
5 with fraud" expression is coming from, but
6 put together in the context of this request,
7 it's nonsensical, and we shouldn't be
8 required under any theory to respond.

9 THE ARBITRATOR: Well, as to Request
10 No. 5, there's two different versions of it.

11 MR. DEXTER: I think it was changed to
12 "permeated."

13 THE ARBITRATOR: Yes, that's the point
14 I was about to make.

15 And I assume that that's a quote from
16 the complaint.

17 MS. CHAITMAN: It's a quote from the
18 trustee's expert, who said that.

19 MR. JACOBS: If it's a quote from --

20 THE ARBITRATOR: But obviously it's,
21 from the trustee's perspective, lifting the
22 words out of context.

23 MR. JACOBS: At a minimum, it's
24 lifting the words out of context. It's
25 completely divorcing the words of any context

1 and putting it in a request that, when read,
2 is not coherent.

3 THE ARBITRATOR: Well, let's not
4 characterize it pejoratively. The reports
5 presumably are going to be the reports of
6 Collura and -- I'm not quite sure what
7 Greenblatt talks about, but maybe Greenblatt.

8 And as to certain of her customers, to
9 the extent she stipulates to the accuracy of
10 the deposits and withdrawals, there's no
11 reason why you should have to answer Request
12 No. 5.

13 But to the extent she does not so
14 stipulate, it seems to me those reports will
15 be the expert reports. And the expert
16 reports will reference, I would imagine, the
17 documents upon which the expert bases his or
18 her conclusion.

19 So you may be getting that later than
20 you wished, Ms. Chaitman, but you will be
21 getting it.

22 MR. JACOBS: And I can also add that
23 the case -- the case-wide documentation
24 underlying those reports is already in Data
25 Room 1, which has been made available. That

1 would include all of the bank transfer
2 records that we have, which are labeled by
3 producing bank and the appropriate subfolder
4 so it's easy to find.

5 There's also -- as we told
6 Ms. Chaitman, there's a full universe of
7 every customer's statement. There's a full
8 set of all the customer statements that we
9 have in the data room. And while we've made
10 that available in connection with our expert
11 report -- while we may disagree it's relevant
12 to the issue of whether this defendant
13 received transfers, as we've said, it was
14 considered by our expert in connection with
15 his conclusions. And it's in the data room,
16 so you can do with it what you see fit. It's
17 made available to you.

18 THE ARBITRATOR: Let's move on.

19 MS. CHAITMAN: Okay.

20 THE ARBITRATOR: What's next?

21 MS. CHAITMAN: We need to go to 4,
22 your Honor, "List every profit withdrawal
23 entry on a customer statement where there's
24 no documentary evidence that the customer
25 requested to receive profit" --

1 THE ARBITRATOR: I'm sorry. Which
2 number?

3 MS. CHAITMAN: Number 4. We skipped
4 4. We went from 3 to 5.

5 THE ARBITRATOR: Right.

6 MR. JACOBS: Your Honor, this is again
7 the problem with doing these requests
8 theoretically across cases with -- divorced
9 from a factual context. There are no PW
10 transactions in this case. But even if there
11 were, Ms. Chaitman has all of this discovery
12 already in connection with the PW proceeding.

13 I'll stipulate that it can be
14 deemed -- it's deemed produced in this or in
15 any other case where PW is an issue. That
16 discovery was exhaustive. There were expert
17 reports exchanged. There were documents
18 underlying those reports exchanged. She has
19 all of it already.

20 So it's not relevant to this case, but
21 even if it were, I would agree to deem it
22 produced in this case so we don't have to go
23 through the charade of producing it again.

24 THE ARBITRATOR: Let me just say that
25 my marginal note to myself was "Going to be

1 addressed in PW litigation," and I didn't
2 have a question mark after it so --

3 MS. CHAITMAN: No, but the answer
4 is -- the answer is no because Judge
5 Bernstein's order specifically provided that
6 the profit withdrawal litigation was only for
7 people who asserted SIPA claims, but were not
8 defendants in claw-back actions. So he
9 segregated it. So no one who was a defendant
10 in a claw-back action had the right to
11 participate in the profit withdrawal
12 litigation.

13 THE ARBITRATOR: Let me ask a
14 different question, which is, suppose
15 Customer Jones never requested a profit --
16 let me go back a step.

17 Are we using "profit withdrawal" as a
18 term of art to mean something that's a subset
19 of withdrawals generally?

20 MS. CHAITMAN: Yes. These were
21 withdrawals that occurred before 1992 in
22 general. There were some afterwards up to
23 1997, but the -- they were reflected on
24 statements from 1980 or '81 and some up to
25 1997. Most ended in 1992. It was a specific

1 entry.

2 THE ARBITRATOR: And were these
3 customers who were getting all of the monthly
4 profits shown or quarterly were getting
5 profit withdrawals or what?

6 MS. CHAITMAN: Under this trading
7 strategy, they would get the profit on a
8 specific arbitrage transaction when the money
9 hit the account. And the evidence in the
10 profit withdrawal litigation has been that
11 people were not sent profit withdrawals
12 unless they asked for them in writing.

13 So what Collura did with respect to
14 the profit withdrawal participants, which was
15 a subset that excluded all the claw-back
16 defendants, is, she produced a report which
17 said, as to the following 3,000 people,
18 whatever it was, there is no documentary
19 evidence within Madoff's records that these
20 people requested or received a profit
21 withdrawal.

22 So what I'm asking for -- I don't
23 believe I have to wait for expert reports on
24 this. I'm asking whether there is any
25 documentary evidence to support the profit

1 withdrawals on the claw-back defendants'
2 statements.

3 Now, obviously it doesn't reflect --
4 it didn't affect the three that we're
5 specifically talking about, but these
6 interrogatories were intended to be served on
7 everyone.

8 THE ARBITRATOR: I'm still not getting
9 why, as to the claw-back defendants, this is
10 relevant or why they're carved out.

11 MS. CHAITMAN: Because Judge Bernstein
12 did that. Honestly I think he shouldn't
13 have, but he did. And so the factual --

14 MR. JACOBS: That is actually defense
15 counsel's request, to carve out, so the PW
16 proceeding is separate from the adversary
17 proceeding.

18 THE ARBITRATOR: I understand -- maybe
19 I misunderstand, but my understanding was
20 that Judge Bernstein is looking for issues
21 that can be dealt with universally and that
22 one of those is the profit withdrawal issue
23 and that, therefore, he's having an omnibus
24 hearing or litigation, whatever you want to
25 call it, with respect to that.

1 Is that correct?

2 MR. JACOBS: That is correct, but it's
3 only -- I agree with Ms. Chaitman. By court
4 order, it's only applicable to the claimants.

5 MS. CHAITMAN: Not the claw-back
6 defendants.

7 MR. JACOBS: And those are customers
8 who we didn't necessarily sue, but who filed
9 claims with the trustee. We denied the
10 claim, for whatever reason, and they
11 objected. And we're now litigating the
12 objections. And part of that objection is
13 that the trustee didn't properly credit these
14 PW transactions. So it gets unfolded --

15 THE ARBITRATOR: Let me just be --
16 before you say whatever it is you were about
17 to say, Ms. Chaitman, if the trustee
18 stipulates that all of the discovery in the
19 PW litigation will be made available to you
20 here, doesn't that go a long way to resolving
21 this?

22 MS. CHAITMAN: No, because there was
23 no discovery in the PW proceeding relating to
24 the claw-back defendants. That was the
25 whole -- I don't -- I don't recall why it was

1 done that way, but my impression was that
2 Judge Bernstein ordered that, that if you
3 were a claw-back defendant and you challenged
4 a profit withdrawal, you had to do it in the
5 claw-back discovery. So that's why we're
6 asking this specific information.

7 MR. JACOBS: I think I can address
8 this. There's two separate types of
9 discovery that, in my mind, related to PW
10 that would be relevant in an adversary
11 proceeding that has PW in a relevant account.

12 One is, in the fact discovery stage,
13 all of the materials we already produced,
14 which are the account statements, the bank
15 transfer records and the account opening and
16 closing documents and all of the
17 correspondence, which would contain all of
18 the evidence we have with respect to those
19 sued-upon accounts of how those PW
20 transactions should or would be or were
21 characterized. Right.

22 Secondly, there will be -- PW will
23 likely be addressed by our experts later on
24 down the road as part of their analysis that
25 might fill any factual gaps for which there's

1 no record one way or another.

2 So discovery -- we are already
3 affirmatively producing any PW-related
4 materials that would be relevant in any given
5 adversary proceeding specific to those
6 defendants in the case. Then I anticipate
7 we'll also be --

8 THE ARBITRATOR: If somebody
9 affirmatively requested, by way of a letter,
10 for example, profit withdrawal, that also --

11 MR. JACOBS: That's a produced --

12 THE ARBITRATOR: -- to the extent you
13 had it, that would be part of this CAD?

14 MR. JACOBS: Correct. So our initial
15 disclosure production, we do this without
16 even a request. It just goes out the door.
17 We repackage it. It's the core account
18 documents, which are customer statements and
19 other similar types of reports that BLMIS
20 generated over time, reflecting all of the
21 customer account activity for all of the
22 relevant accounts.

23 So that would be the sued-upon
24 accounts and any accounts from which the
25 sued-upon accounts got inter-account

1 transfers.

2 We also produced the bank transfer
3 records, which would be JPMorgan, in most
4 instances, records of cash activity coming to
5 and leaving BLMIS's account to or from the
6 defendants.

7 We also produced a customer file for
8 those accounts that BLMIS maintained, which
9 includes all the correspondence. So if
10 Defendant X wrote a letter to Bernard Madoff
11 instructing that dividends on certain stocks
12 held in my account should be -- result in a
13 check paid to me, that would be produced.
14 All of that's produced in fact discovery
15 right out of the gate.

16 THE ARBITRATOR: And the only
17 carve-out is the adversary proceedings.

18 MR. JACOBS: The carve-out from the PW
19 claims proceeding?

20 THE ARBITRATOR: Yes.

21 MR. JACOBS: Yes, the adversary
22 proceedings are carved out from that.

23 THE ARBITRATOR: Ms. Chaitman has 92
24 of those -- just give me a sense of scale,
25 how many adversary proceedings are still

1 kicking around?

2 MR. JACOBS: We have around 350 or so
3 still active, I believe.

4 MS. CHAITMAN: You told me 300 a
5 couple of months ago.

6 MR. JACOBS: It's around 300. I might
7 be off.

8 THE ARBITRATOR: Well, so as to
9 Ms. Chaitman's clients, she's going to get
10 that at the expert discovery stage, and the
11 underlying documents from which you could
12 infer the answer have been produced.

13 What she's not getting by way of that
14 is, for the other 208 or so accounts, that
15 information, but I think the relevance of it
16 as to the other 208 is dubious, at best.

17 So I'm not going to require an answer
18 to Request No. 4 at this time.

19 MR. JACOBS: Thank you, your Honor.

20 MS. CHAITMAN: Okay. Request No. 6
21 where I have some requests that go to the
22 nature of the outstanding claims, so I think
23 you can rule on them as a body. And I just
24 want to explain to you why we think it's
25 important.

1 THE ARBITRATOR: 6 through 9 deal with
2 the net equity issue, as I understand it;
3 right? Where you say the court didn't have a
4 full --

5 MS. CHAITMAN: It didn't have a full
6 picture --

7 THE ARBITRATOR: Factual record.

8 MS. CHAITMAN: It didn't have a full
9 factual record when it made the
10 determination. And I would like -- obviously
11 these cases are going to go back to the
12 Second Circuit and possibly even to the
13 Supreme Court. And I would like to have a
14 full factual record.

15 So, for example, if the only claims
16 that are left are claims of the huge feeder
17 funds or something like that, then I think
18 that that's part of the factual record that
19 the courts that look at this should be aware
20 of. And it's readily available to the
21 trustee because he has a distribution list.
22 So all he has to do is give us the
23 distribution list.

24 And at some point in time, the
25 subcommittee of the Commercial Financial

1 Services committee and the house had
2 requested this information of SIPA. And it
3 had been delivered to Congressman Scott
4 Garrett as of a certain point in time. I'm
5 simply asking that that be updated.

6 THE ARBITRATOR: The only part of this
7 that I'm inclined to grant, but you may have
8 the information already, is in Request No. 9
9 or maybe Request No. 6 or both; but
10 basically, I think you're entitled to
11 aggregate claim information, but I assume the
12 trustee reports that periodically.

13 MR. JACOBS: That's reported in every
14 single interim report that we file. It's
15 also regularly updated on the trustee's
16 website at www.madofftrustee.com. So with
17 the click of a mouse, all of that information
18 is in realtime, updated and available to
19 Ms. Chaitman.

20 And beyond that, we rigorously object
21 to having to produce any additional
22 materials. Judge Bernstein has explicitly
23 rejected this legal defense. It's really an
24 attack on the trustee's standing under SIPA
25 78fff-2(c)(3). The defendants are planning

1 to argue that he has enough money to fulfill
2 all the outstanding claims in the customer
3 fund.

4 And that's simply not true at the time
5 this defense was raised. It was not true at
6 the time Judge Bernstein rejected explicitly
7 this legal argument and his omnibus decision
8 on the motion to dismiss. And it's not true
9 today.

10 So there's no legal basis that would
11 allow for an order determining that any of
12 this discovery is relevant.

13 THE ARBITRATOR: Well, as I said, I'm
14 not going to allow it except to the extent
15 that it's aggregate information. And that is
16 publicly available. So the short answer is
17 I'm not going to allow it. When the Second
18 Circuit reverses based on that ruling by
19 Judge Bernstein and me, then I guess we'll be
20 back at it again.

21 What's next?

22 MR. HUNT: One of the drabs that comes
23 in for...

24 MR. JACOBS: I believe that was 6
25 through 9.

1 THE ARBITRATOR: Right.

2 Ms. Chaitman?

3 MS. CHAITMAN: So 10 --

4 THE ARBITRATOR: 10 is where I have to
5 go to the other set because you substituted.

6 It's not asking about the fee arrangement
7 anymore. It's --

8 MS. CHAITMAN: No, it's here. Here it
9 is.

10 THE ARBITRATOR: I've got it here.
11 List of every allowed claim, is that it?

12 MS. CHAITMAN: Yes.

13 THE ARBITRATOR: I think -- how is
14 that different than 6 through 9?

15 MS. CHAITMAN: It's not. I agree.

16 THE ARBITRATOR: So the ruling is the
17 same.

18 MR. JACOBS: I'm sorry. Which number
19 were we just looking at?

20 THE ARBITRATOR: Number 10.

21 MS. CHAITMAN: So number 11, we're
22 asking for, "For each year of Madoff's
23 operation, state all facts on which you base
24 your position that Madoff did not purchase
25 securities for his investment advisory

1 customers and produce the documents on which
2 you base your position."

3 This goes to one of the most important
4 issues in the case for anyone who was a
5 long-standing Madoff customer.

6 THE ARBITRATOR: This is the dispute
7 between the trustee's position and
8 Mr. Madoff's testimony and Mr. DiPascali's
9 plea.

10 MS. CHAITMAN: Right, but the point
11 is, we have a right to the production of
12 these documents. This goes to a core issue
13 in the case.

14 THE ARBITRATOR: Let's take the first
15 part of it first. I think that it's not
16 unduly burdensome and is relevant to have you
17 set forth the trustee's position, which I
18 assume can be done in a paragraph.

19 MR. JACOBS: Your Honor, this is
20 exactly the subject of Bruce Dubinsky's
21 report. We intend to meet our burden of
22 proof through an expert that we proffered in
23 this case. We provided Ms. Chaitman with an
24 early production of that report, which is our
25 answer to this request. It's not -- it is

1 absolutely, given the complexity of the fraud
2 that occurred, not something we can reduce to
3 a paragraph.

4 THE ARBITRATOR: So the answer may be,
5 see Dubinsky report at pages whatever through
6 whatever.

7 MR. JACOBS: Right. I believe that's
8 what we did answer. We said the request was
9 premature because it was the subject of
10 expert analysis and it will be disclosed
11 pursuant to the case management order.

12 THE ARBITRATOR: I looked at the
13 request, but not the --

14 MR. JACOBS: I'm not looking at it
15 right now either, but I can't imagine we said
16 anything different.

17 MS. CHAITMAN: I have the response.
18 Do you need the response, Judge?

19 THE ARBITRATOR: No, I've got it here.

20 MR. JACOBS: "The trustee objects to
21 this request on the grounds that it
22 prematurely seeks to have the trustee
23 disclose expert material well in advance of
24 the deadline in the case," but that's the
25 objection I'm making.

1 THE ARBITRATOR: Let me interject.

2 Off the record before you do that.

3 (Discussion off the record.)

4 MR. JACOBS: I'm happy to repeat that.

5 It was 78fff-2(c)(3).

6 THE ARBITRATOR: Start over.

7 MR. JACOBS: Please feel free to
8 interrupt me any time.

9 THE ARBITRATOR: Let's -- back on the
10 record.

11 There were a number of bases on which
12 the trustee initially objected to Request
13 No. 11, one of which is work product, the
14 second of which is that Ms. Chaitman was
15 asking for expert discovery materials
16 prematurely, although that's now been waived
17 by production of the Dubinsky report;
18 correct?

19 MR. JACOBS: That's correct. So our
20 initial objection referenced the upcoming
21 report, which -- the disclosure of which was
22 not yet due. Subsequently, in an effort to
23 try to avert as many disputes as possible
24 from coming to your attention or to the
25 court's attention, we made -- we went ahead

1 and made an early production of that report
2 in this case.

3 THE ARBITRATOR: But as to Request
4 No. 11, as a matter of form, I think
5 Ms. Chaitman is entitled to an answer
6 certainly to the first part of this, which is
7 "state all facts." And if it's done by
8 referencing the Dubinsky report, so be it.

9 And in terms of producing the
10 documents on which you base your position,
11 are there any documents related to
12 Ms. Chaitman's clients upon which Dubinsky
13 bases his position that have not been
14 produced?

15 MR. JACOBS: No. Absolutely not.

16 THE ARBITRATOR: In any of her 92
17 cases?

18 MR. JACOBS: Correct.

19 THE ARBITRATOR: So I think that deals
20 with Request No. 11.

21 MS. CHAITMAN: Well, I don't think it
22 does because this is precisely the issue we
23 were talking about before. The Madoff
24 trading records -- to the extent that some of
25 my clients' accounts go back to the 1980s,

1 the Madoff trading records have not been
2 produced. And if the trading records were in
3 stocks that appeared on my clients'
4 statements, then my argument would be that
5 this is evidence that Madoff was trading with
6 respect to those accounts.

7 THE ARBITRATOR: But you're not asking
8 for, in effect, civil Brady material. You're
9 asking for the documents which support the
10 trustee's position, not those which refute
11 the trustee's --

12 MS. CHAITMAN: Right --

13 THE ARBITRATOR: -- position.

14 MS. CHAITMAN: -- I am, but the point
15 is it's the converse.

16 THE ARBITRATOR: But the request is
17 produce the documents that support your
18 position.

19 MS. CHAITMAN: Right. But the point
20 is, I don't think he has any documents. And
21 that's why I think I'm entitled to a written
22 answer to that effect. If there are no
23 documents, let him say that.

24 THE ARBITRATOR: Well, so as to the --
25 I'm going to limit this second part of this

1 to the 92 clients of Ms. Chaitman. And you
2 can answer it by referencing the documents
3 that you believe support your position, the
4 underlying documents. It may be simply a
5 reference to the CADs, but --

6 MR. JACOBS: Right. Well, I guess my
7 problem with this, your Honor, is that
8 Mr. Dubinsky provides about a hundred-page
9 report that goes in-depth, in detail
10 responding to this exact issue and talks
11 about the analysis he conducted with respect
12 to securities trading for the IA business and
13 his conclusion there was no evidence of any
14 securities trading on behalf of any IA
15 customer at any given point in time.

16 He also talks at length about the
17 relationship between the different functions
18 of BLMIS, like -- enormous detail on the
19 actual stock trading activities that did
20 occur, all of those things, so --

21 THE ARBITRATOR: Is there an executive
22 summary?

23 MR. JACOBS: What you're asking me to
24 do is provide an executive summary of expert
25 analysis, which I don't think is appropriate.

1 THE ARBITRATOR: I'm saying in his
2 report, is there -- I understand it goes on
3 for a hundred pages, but is there a
4 two-paragraph version of it?

5 MR. JACOBS: I believe that there is
6 at the beginning, yes. And there are
7 certainly conclusions that are condensed as
8 to the big picture, but I don't think it's
9 appropriate for me, as an attorney, in
10 responding to an interrogatory that goes
11 to -- directly to our expert's analysis -- I
12 don't think it's appropriate for me to have
13 to find a way to paraphrase and package that
14 analysis in a way -- you know, all of the
15 facts he considered, all of the documents he
16 considered, all of the work that he did to
17 reach that executive summary conclusion is
18 detailed at great length in the report. And
19 I believe I should be entitled to defer to
20 that report in lieu of an additional response
21 to this question, which is what I would like
22 to do.

23 THE ARBITRATOR: I'm not disagreeing
24 with that.

25 MR. JACOBS: Okay. I was

1 understanding you were asking for a paragraph
2 where I would just disclose specific
3 documents --

4 THE ARBITRATOR: I was, but --

5 MR. JACOBS: -- and the like when I've
6 hired an expert who does exactly that. I
7 would like that expert to stand or fall on
8 his analysis on his own, independent of my --
9 you know, my characterization of that expert.

10 THE ARBITRATOR: I assume his report
11 reveals the documents on which he relies.

12 MR. JACOBS: That's absolutely
13 correct. And consistent with the litigation
14 procedures order that I referenced earlier in
15 the day, the e-Data Room 1, which we
16 discussed at length today, was formed for the
17 specific purpose of making available --

18 THE ARBITRATOR: Well --

19 MR. JACOBS: -- all of that material.

20 THE ARBITRATOR: -- so you may be able
21 to answer this. I am going to require an
22 answer. You may be able to answer it by
23 reference to the report.

24 MR. JACOBS: Okay.

25 THE ARBITRATOR: And obviously I

1 haven't read the report. If there's some
2 fine-tuning that's warranted, we'll deal with
3 that down the road.

4 MR. JACOBS: Okay. Thank you, your
5 Honor.

6 THE ARBITRATOR: Next.

7 MS. CHAITMAN: Okay.

8 MR. JACOBS: Number 12 is asking --
9 again it's the same issue as Request No. 1.
10 It's asking for -- it can be construed as
11 asking for our work product of employees or
12 other individual -- interviews of individuals
13 in connection with those conclusions.

14 Now, I will say Mr. Dubinsky, in his
15 report, does reference all of the materials,
16 the depositions and examinations, he did in
17 his investigation in arriving at his
18 executive summary conclusions. That's all
19 disclosed to the extent it's available.

20 Beyond that, I'm objecting to any
21 additional disclosure on the basis that it's
22 work product.

23 MS. CHAITMAN: So let me ask you
24 something, Judge. Do you think it's
25 appropriate -- let's just assume that, in

1 fact, the trustee's personnel have spoken
2 with some of the Madoff traders, who insist
3 that they actually did legitimate trades and
4 that they did trades for the investment
5 advisory customers.

6 Is it your position then that they
7 don't have an obligation to disclose that to
8 me?

9 THE ARBITRATOR: You're
10 hypothesizing -- let me make sure I
11 understand this -- that, by way of example,
12 counsel or some other investigator that
13 counsel retained spoke to employee X, who
14 said, Madoff is right, it was trading. And
15 then, without disclosing that, they hired
16 Mr. Dubinsky and said, go off and do your own
17 investigation.

18 MS. CHAITMAN: Right.

19 THE ARBITRATOR: And Dubinsky issued
20 his report, and the trustee did not disclose
21 to Mr. Dubinsky that there's evidence to the
22 contrary.

23 MS. CHAITMAN: Right.

24 THE ARBITRATOR: Well, I think that if
25 that were the case, Baker Hostetler and its

1 lawyers would have much more fundamental
2 problems dealing with their ability to
3 practice law in the future.

4 MS. CHAITMAN: But then why wouldn't I
5 be entitled to this information?

6 THE ARBITRATOR: Because it's classic
7 work product. They --

8 MS. CHAITMAN: But we have a need for
9 it and we have no access to it. The trustee
10 is in a unique position to be able to
11 question the former Madoff employees.

12 MR. JACOBS: This request is coming as
13 pure speculation as if things she presumes --
14 things exist that are purely conjecture.
15 There has to be an articulable need for
16 specific information.

17 THE ARBITRATOR: Well, within these
18 adversary --

19 MR. JACOBS: I can't make up things
20 that didn't happen or that don't exist.

21 THE ARBITRATOR: Within these
22 adversary proceedings, when does deposition
23 discovery occur?

24 MR. JACOBS: In fact discovery for
25 fact witnesses --

1 THE ARBITRATOR: Right.

2 MR. JACOBS: -- and then expert
3 discovery for expert witness. Expert
4 discovery has come and gone. In a number of
5 Ms. Chaitman's cases, she hasn't deposed
6 Mr. Dubinsky. She hasn't deposed
7 Ms. Collura. She hasn't deposed
8 Mr. Greenblatt.

9 Ms. Chaitman, other than Mr. Madoff,
10 hasn't served any Rule 45 subpoenas for
11 deposition testimony of any BLMIS employees
12 or anybody else.

13 It's incumbent upon Ms. Chaitman to
14 conduct her own investigation, further her
15 speculative theories of the case. We don't
16 have any obligation to do that for her. And
17 to the extent we've done it, it's our work
18 product, which is shielded from discovery.

19 THE ARBITRATOR: Well, I'm not
20 unsympathetic -- and this is probably a
21 speech I should have given at the beginning.
22 I'm not unsympathetic to the fact that even
23 with 92 clients, Ms. Chaitman's resources are
24 considerably less than the trustee's.

25 And in appropriate circumstances, that

1 might warrant some shortcuts, but you have
2 been given a list of all of the employees.
3 And, again, Request No. 12, like at least one
4 of the other requests, asks for attorney work
5 product to the extent that it's going beyond
6 what Mr. Dubinsky did. So I'm going to deny
7 Request No. 12.

8 MS. CHAITMAN: Okay. Request No. 13,
9 they actually ultimately produced the
10 document.

11 THE ARBITRATOR: Right.

12 MS. CHAITMAN: "Explain the basis on
13 which you determined that the defendants have
14 no net equity and produce the front and back
15 of each check."

16 Well, they've actually -- they
17 produced those now.

18 Number 15, "Explain how you intend to
19 establish that Madoff was insolvent in each
20 year from 1960 to 2000 and produce all
21 documents on which you will rely to establish
22 insolvency."

23 What they've done is simply relied
24 upon their expert.

25 THE ARBITRATOR: Right.

1 Who's the expert on this?

2 MR. JACOBS: It's Mr. Dubinsky. So
3 his report is broad in insolvency
4 collectively. And so all that discovery and
5 that analysis has been made available in this
6 case.

7 However, Judge Bernstein has raised a
8 good question as to whether insolvency is any
9 longer actually an element in our case -- in
10 this case. I believe the answer is, no, it's
11 not a burden of proof that we have with
12 respect to the avoidance actions.

13 However, I expect at some point that
14 will be addressed on motion or briefing after
15 further briefing with Judge Bernstein.

16 But even if it is relevant, it's our
17 same response as to the prior request,
18 number 11, asking for the basis of the facts
19 on which we state our conclusion that BLMIS
20 was a fraud. It's the same answer as -- this
21 is exactly the subject matter of
22 Mr. Dubinsky's expert's analysis. We rely on
23 his report in answering this interrogatory
24 and all of the specific documentation he
25 references, which we've made available in

1 e-Data Room 1.

2 MS. CHAITMAN: If they're relying on
3 the Dubinsky report, then they're limited to
4 the Dubinsky report, I assume, and they're
5 not going to be able to introduce evidence
6 beyond that. And if I get such an order,
7 then I'm satisfied with it.

8 But I don't want a situation where
9 they all of a sudden decide that, for
10 whatever reason, Dubinsky's report is not
11 reliable and now they're going to put in a
12 whole bunch of evidence that I haven't had
13 the opportunity to obtain in discovery.

14 MR. JACOBS: On insolvency?

15 MS. CHAITMAN: Yes.

16 MR. JACOBS: We have endeavored to
17 make available everything we could possibly
18 find that might be relevant to that subject
19 matter. You have all --

20 THE ARBITRATOR: Is there anything
21 beyond Dubinsky and the documents he relies
22 on that you would proffer at trial?

23 MR. JACOBS: Absolutely not. And
24 certainly if -- just as Ms. Chaitman stated
25 earlier, if we obtain something from a third

1 party, we'll provide it and we'll add to the
2 data room and we'll supplement a report, if
3 needed. We'll make it available. But
4 sitting here today, there's nothing to my
5 knowledge that has not been made available on
6 that subject.

7 THE ARBITRATOR: I think you can
8 answer it by saying, "See Dubinsky report."

9 MR. JACOBS: Okay.

10 THE ARBITRATOR: What I know about
11 bankruptcy could be written on the head of a
12 pin, but I did look at 11 U.S.C. Section 548
13 (a)(1)(A) versus (B). And it does appear
14 that Judge Bernstein was right when he said
15 that insolvency is not an issue when you have
16 an intent to defraud.

17 MR. JACOBS: Right. And to explain
18 why we address it affirmatively is, as I'm
19 sure you know from the background materials
20 we provided, the legal landscape of this case
21 has changed for many defendants over time,
22 including what we call the feeder fund in the
23 bank cases, where we have a claim above and
24 beyond just the avoidance actions we have
25 here.

1 But also -- you know, insolvency also
2 could be construed as being indirectly
3 relevant to the fraud. Insolvency is an
4 indicia of fraud. So that interrelates with
5 these earlier periods of time. Whether it
6 be -- so I'm making this point because the
7 issue of whether stocks were traded or not is
8 in and of itself not conclusive of whether
9 there was a Ponzi scheme or a fraud.

10 So that is an important fact that I
11 don't think gets conflated in the discovery
12 disputes we're having. I just wanted to make
13 it clear.

14 THE ARBITRATOR: Okay. Anything else
15 on Wilenitz?

16 MS. CHAITMAN: Yes, number 16.

17 THE ARBITRATOR: Oh, I'm sorry.

18 MS. CHAITMAN: "Provide the gross
19 trading volume by both number of shares
20 traded and total dollar value for each of
21 Madoff's operations broken down by the
22 investment advisory business, the proprietary
23 trading business, and the market-making
24 business and produce the documents on which
25 you base your responses."

1 MR. JACOBS: Now, our objection here,
2 your Honor, is something you alluded to this
3 morning with respect to the nature of the DTC
4 records. Our answer -- our objection to this
5 particular request is -- we have a number of
6 objections, but first and foremost, this is
7 an investigation that Ms. Chaitman is asking
8 us to do to further her speculative theory
9 that she wishes to advance to challenge the
10 fraud.

11 We've made the underlying
12 documentation that is available, all of it,
13 to her. She can do that investigation
14 herself. And under Rule 33(d) that is
15 entirely appropriate and called for here.

16 And to be clear, we're not just saying
17 go look in the data room. We have told her
18 specifically where all of the documents she
19 would need to attempt this manipulation of
20 the data for her purposes can be found. And
21 it's all in a single, segregated folder
22 called DTC under the main subfolder data in
23 the data room.

24 MS. CHAITMAN: But it doesn't because
25 that's not -- that's 2002 on. And, again,

1 we're --

2 MR. JACOBS: Again, I'll reiterate,
3 your Honor, Ms. Chaitman has everything we
4 have and we've -- at the moment, that we know
5 of. So we don't have any other documentation
6 that we know of that would allow us to do
7 this.

8 And the DTC records specifically --
9 they don't track -- they show day-over-day
10 difference, like in volume. So they'll show
11 that X amount of a certain type of stock
12 was -- existed and BLMIS held this day and
13 then the next day it changed by this amount.

14 It's not exact -- the DTC records
15 don't break out the data into these easily
16 discernible buckets that Ms. Chaitman would
17 like it to. And unfortunately we can't help
18 that. So we can't do the impossible.

19 I don't know of any records that would
20 allow us to assign this volume data that
21 she's looking for by the proprietary trading
22 versus investment advisory business. All I
23 can say is that we have the DTC data that
24 reflects trading done through BLMIS's only,
25 and they only have one, DTC terminal for the

1 relevant period that we have.

2 And it's all been made available, and
3 she can do whatever investigation she wishes,
4 including, she can hire her own consultants
5 to analyze that, she can hire her own expert
6 to opine as to what that means. We shouldn't
7 have to do that for her.

8 THE ARBITRATOR: I gather this goes to
9 the notion that if two of the three
10 activities of BLMIS were legitimate, the
11 Ponzi scheme presumption should not apply.

12 MS. CHAITMAN: In part.

13 THE ARBITRATOR: Okay.

14 MS. CHAITMAN: And, in part, that the
15 fraud did not start until 1992. So, you
16 know, the DTC records, which unfortunately
17 only exist from 2002 on, are not relevant.
18 Once Mr. Madoff says the fraud started in
19 1992, I'm not going to argue that it started
20 later. Right. So I'm only focusing on the
21 period prior to 1992.

22 But, again, that's very significant
23 because a lot of my clients would be entitled
24 to dismissal of the complaint if the court
25 found that the fraud did not start until

1 1992.

2 THE ARBITRATOR: Is it correct,
3 Mr. Jacobs, that you don't have the records
4 for the period from 1980 to 1992, to your
5 knowledge, that --

6 MR. JACOBS: It's the same records we
7 were discussing earlier in the day that we
8 will look for. I will update you in a week's
9 time as to those efforts. I don't know of
10 any that I confirm that exist beyond what is
11 in the data room currently. And if we find
12 them, we will produce them.

13 THE ARBITRATOR: But even if there are
14 records, it seems to me that this is really
15 an exercise -- I recognize that we're dealing
16 with far more limited resources, but one that
17 you, or an expert that you retain, would have
18 to engage in; that it's not appropriate to
19 have the trustee endeavor to do this,
20 assuming that he could, in terms of breaking
21 it down by business.

22 And I thought I heard Mr. Jacobs say
23 that they couldn't do it even if they had the
24 records. So I'm going to deny that request.

25 17? Is that --

1 MS. CHAITMAN: 17 I think we covered
2 because that was the employees.

3 THE ARBITRATOR: Right. Well --

4 MS. CHAITMAN: I've got the list that
5 specifies the area so --

6 THE ARBITRATOR: What else?

7 MS. CHAITMAN: -- I'm okay with that.

8 18. And this is "For each security
9 listed on the defendants' account statements
10 for each year from 1982 on, set forth the
11 number of shares that BLMIS held."

12 And that again goes to the trading
13 records. And just to be absolutely clear
14 about this, the evidence of the trading could
15 have existed in a number of different forms.
16 It could have been actual computer-generated
17 records where they kept track of the
18 securities.

19 And considering the volume that Madoff
20 was doing and the fact that it was
21 market-making, it wasn't done on an exchange.
22 So it was done privately, from firm to firm.
23 And there were internal records -- there
24 would be like a -- at the end of a day, there
25 would be a netting out sheet, which would

1 have -- could go on for thousands of
2 transactions. And then at the bottom, it
3 would say Madoff owes the clearinghouse
4 3 cents or the clearinghouse owes Madoff
5 3 cents. So it could be that.

6 There are all different kinds of
7 records that would have reflected the
8 trading. And I just want it to be clear that
9 I'm asking for that very broad scope, and
10 we're talking about the period prior to 1992.

11 MR. JACOBS: Again, your Honor, the
12 issue is the same as the issue I had with
13 Request 16. All of the documents that
14 evidence actual trading at BLMIS have been
15 made available to Ms. Chaitman, in addition
16 to the DTC records, as I mentioned.

17 We also subpoenaed the Chicago Board
18 of Options Exchange. We also subpoenaed the
19 Chicago Mercantile Exchange. We also scoured
20 all the books and records of the debtor to
21 see if there were any indicia of these
22 out-of-the-market or weekend or black pools
23 of liquidity -- trading that Mr. Madoff says
24 he was doing. There's no evidence of that.
25 And what there is we've made available.

1 So what Ms. Chaitman would like to do
2 is -- if I understand her theory correctly,
3 is she would like to now argue that the --
4 there were stocks traded through the
5 proprietary trading arm of BLMIS on behalf of
6 specific IA customers.

7 And I can tell you with all of the
8 documents that I currently know exist, which,
9 again, I reiterate she has, there is
10 absolutely no evidence that that ever
11 happened.

12 And, furthermore, even if I wanted
13 to --

14 THE ARBITRATOR: But she also has an
15 interim step, which is, if IBM was shown on
16 Customer Jones' statement and --

17 MR. JACOBS: Right.

18 THE ARBITRATOR: -- and BLMIS was long
19 IBM on that same date --

20 MR. JACOBS: Right.

21 THE ARBITRATOR: Tell me that.

22 MR. JACOBS: Right. Well, it's my
23 understanding -- and, again, I don't want to
24 speak for our expert, but this is an issue
25 that, again, Mr. Dubinsky squarely addresses

1 in his report. It's not possible to match an
2 inventory with a customer statement and say
3 there's a match.

4 Because in, I believe, every instance
5 that Mr. Dubinsky -- wherever he attempted to
6 do that, where he tried, he failed. The
7 records simply don't match. Because the
8 customer statements were generated -- BLMIS
9 had a shadow DTC terminal that wasn't
10 connected to DTC, where we have offered
11 proofs that they actually faked templates of
12 what that trading activity would look like.

13 They populated it after the fact.
14 They put that into their computer system and
15 used that information to spit out the
16 customer statements that reflects that
17 purported, but fraudulent, trading activity.

18 And Mr. Dubinsky does painstaking
19 analysis. Again, he's much smarter than me,
20 so I'm not going to be able to articulate all
21 the ways in which he does it, but he attempts
22 to reconcile those customer statements with
23 the DTC materials that we know do reflect
24 actual trading that occurred, and he can't.

25 And the grand finality of his

1 conclusion is that there's no evidence of any
2 instance where BLMIS was actually trading on
3 behalf of a specific IA customer.

4 So, again, to answer that question, I
5 would refer -- I would answer with
6 Mr. Dubinsky's report and rely on that for
7 the information contained therein.

8 THE ARBITRATOR: Well, and it's
9 further complicated potentially by CUSIP
10 numbers.

11 I'm going to deny Request 18 for the
12 same reasons as Request 16.

13 Are we done with that motion? Is
14 there a cross-motion on that?

15 MR. JACOBS: The cross-motion was for
16 a protective order that we would like entered
17 in any case where there's universal
18 applicability to these requests. And I think
19 that since your Honor considered these
20 requests holistically across all types of
21 cases, that an order entering that protective
22 order across all of Ms. Chaitman's cases
23 would be appropriate.

24 Because we didn't look at this through
25 the lens of specifically the Wilenitz

1 defendants. We looked at it as if -- from
2 the perspective of a defendant that hadn't
3 conceded things on behalf of the account or
4 any of those other issues.

5 So I think that in any instance where
6 you have denied the discovery, your Honor, a
7 protective order is appropriate across all of
8 Ms. Chaitman's cases so we don't have to
9 relitigate all of this again.

10 THE ARBITRATOR: Well, I think what I
11 will instead do is have the general principle
12 I outlined earlier, which is that it should
13 apply to all cases that are the same, but it
14 may be that -- without sitting and going
15 through all 92 cases, it would be hard to say
16 it applies to all of these requests and
17 interrogatories as to all of her cases. So
18 I'm not going to do that. It will be more of
19 an --

20 MR. HUNT: Aspirational.

21 THE ARBITRATOR: That was the word I
22 was trying to find.

23 -- aspirational statement than a
24 ruling.

25 MR. JACOBS: Okay. Fair enough.

1 Thank you.

2 (Recess from the record.)

3 MS. CHAITMAN: Are we done except for
4 depositions?

5 MR. HUNT: I think so.

6 MS. CHAITMAN: Okay. So, Judge, if I
7 can just explain about the depositions. The
8 trustee has noticed depositions in all of the
9 cases. And in most of them, I haven't sought
10 a protective order. In these I have, and I'd
11 like to go through them and explain why.

12 THE ARBITRATOR: Sure.

13 MS. CHAITMAN: Some of them you may --
14 Edyne Gordon, if I can take her, is the widow
15 of the account holder. She had nothing to do
16 with the account. She knew nothing about it.
17 She lives in New Mexico. She produced
18 whatever documents she had.

19 And with some of my elderly clients, I
20 feel very protective of them. Because
21 they've never been involved in litigation.
22 It causes them unbelievable anxiety. And I
23 just worry about them physically. And that's
24 the category of people we're talking about.

25 And if there were a compelling factual

1 issue, I would feel differently about it, but
2 the records are what they are. You've
3 immersed yourself enough in the case that you
4 see what the issues are. And there's no
5 issue here of intent or -- I mean, there's
6 nothing really that these people can add.
7 That's why I moved for a protective order in
8 these cases. I can go through them --

9 THE ARBITRATOR: Well --

10 MS. CHAITMAN: -- individually. His
11 wife, she's had a stroke, she's in her 80s,
12 she talks in a very broken way.

13 THE ARBITRATOR: I've read the papers.
14 Customarily if people were deposed, since
15 they're defendants, not plaintiffs, they
16 typically would be deposed where they live,
17 although that might be inconvenient for you.

18 But it struck me that some of these,
19 there probably would be very few questions to
20 ask. Palmer, who's the son, doesn't admit
21 the accuracy of Exhibit B, but also
22 apparently has no firsthand knowledge. I'm
23 not gainsaying that there may be issues he
24 could be asked about if only to preclude him
25 from showing up at trial and saying, suddenly

1 I've remembered something. But maybe with
2 one or two exceptions, if that, these stuck
3 me as depositions that would be
4 extraordinarily short.

5 MR. HUNT: Our experience has been
6 depositions that we've taken of
7 Ms. Chaitman's clients -- that they've been
8 efficient. We've gone to where they live.
9 We've allowed her to appear remotely via
10 video link to try to make it more efficient
11 for them. So, yes, I think you're right.

12 MS. CHAITMAN: But, you know, the bulk
13 of the depositions -- they follow a certain
14 format. And I'm not being critical, but the
15 bulk of the time is, do you recognize this
16 check, you know, look at the back of the
17 check, do you recognize the signature.
18 Because they're proving the deposits and
19 withdrawals.

20 If they give me that package, I can
21 sit down with these people and I can review
22 it. In most instances, we haven't disputed
23 Exhibit B with these clients. So we can
24 avoid that. And it's just the trauma to the
25 clients that I'm trying to avoid.

1 And if there's a way to do it through
2 written questions or just giving me the
3 documents and I'll get back to them, that
4 would just be so much better than subjecting
5 these people to the trauma of this.

6 THE ARBITRATOR: Well, I agree with
7 the trustee that you haven't made the
8 hardship showing in the formal way that --
9 when I was on the bench, I would require it.
10 Mainly a doctor's note saying they're at
11 death's door or non compos mentis.

12 But it does strike me that this is an
13 area where something should be worked out
14 just because there's probably not much there
15 or there for the trustee, although it may
16 vary from defendant to defendant.

17 Gordon and Harwood I guess have no
18 personal knowledge of what went on.

19 MS. CHAITMAN: Palmer, DiGiulian,
20 Gordon, Harwood and Pearlman. Because they
21 were not involved in the accounts. I mean,
22 in Pearlman what happened was there were
23 three siblings. And together they've agreed
24 to Exhibit B. It's just that they didn't all
25 have control in the same period.

1 MR. HUNT: Harwood was directly
2 involved.

3 THE ARBITRATOR: I'm sorry?

4 MR. HUNT: Harwood was directly
5 involved, for example.

6 THE ARBITRATOR: Did you give a copy
7 of this to Ms. Chaitman?

8 MR. HUNT: These are documents that
9 have already been produced to her.

10 THE ARBITRATOR: I assumed that.

11 MS. CHAITMAN: You will -- if you
12 depose her, you'll find out that this was
13 typed up by her husband's secretary, and he
14 brought it home and she signed it, if she
15 signed it or if they signed it for her. She
16 does not have personal knowledge about the
17 account.

18 THE ARBITRATOR: But --

19 MS. CHAITMAN: We don't dispute these.

20 MR. HUNT: That's what we'll find out
21 in the deposition; right?

22 MS. CHAITMAN: Yes, but we don't
23 dispute the deposits --

24 THE ARBITRATOR: Is this something
25 that can be done through a deposition on

1 written questions or a set of interrogatories
2 without prejudice to your right to depose the
3 individual if --

4 MR. HUNT: No, because we've worked
5 for years with Ms. Chaitman on stipulations,
6 on requests for admissions and have
7 repeatedly been stonewalled. And we found
8 that taking depositions of these people is
9 the most efficient way to get the information
10 we need.

11 THE ARBITRATOR: Is there any of these
12 depositions -- assuming that the people are
13 compos mentis and not really slow in their
14 functions, is there any of these depositions
15 that would take more than two hours?

16 MR. HUNT: Depends on their answers,
17 of course. I know that the last deposition
18 that Marie took took longer because
19 Ms. Chaitman appeared remotely. And so every
20 time we introduced a document, we had to
21 identify it to her and read out the Bates
22 number. And so that took longer. But none
23 of these depositions have been full
24 seven-hour depositions.

25 THE ARBITRATOR: Is there any -- any

1 reason why you can't give her the exhibits in
2 advance?

3 MR. HUNT: We've done that too.

4 MS. CHAITMAN: No, you haven't,
5 actually. And the thing is, if you'd give me
6 the exhibits in advance on the deposits and
7 withdrawals, that takes the bulk of the time
8 and we could at least save these people that
9 time.

10 THE ARBITRATOR: Well, I gather you
11 have it -- not with exhibit numbers, but you
12 have it.

13 MR. HUNT: We produced -- the last
14 time we did this where she appeared remotely,
15 we sent her copies of everything we were
16 going to use in the deposition.

17 THE ARBITRATOR: With exhibit numbers?

18 MS. CHAITMAN: Dean, it's not correct.

19 THE ARBITRATOR: Let's not go back to
20 whether it's correct or not. On a
21 going-forward basis --

22 MR. HUNT: We'd be happy -- in the
23 deposition I took last week, we provided a
24 binder with everything numbered with exhibit
25 numbers ahead of time. Sure.

1 THE ARBITRATOR: That should help, A,
2 truncate the mechanics of it. Also give you
3 an opportunity to prep your witnesses.

4 MR. HUNT: The one thing I will say is
5 we will go to where they are and we'll
6 accommodate them in any way we can to make it
7 as --

8 THE ARBITRATOR: Where have you
9 typically done these? In people's houses or
10 nearby law offices --

11 MR. HUNT: No, we've done it in nearby
12 law offices. One guy we did at his house;
13 another we did at a hotel room.

14 MS. CARLISLE: I did an accountant at
15 his house, but that -- he was an accountant,
16 not a defendant. I've had them in hotel
17 rooms. There was like a local -- I
18 discovered like a court reporting service had
19 a suite similar to these where there were
20 different conference rooms. We did one
21 there.

22 Have we done more than one?

23 MR. HUNT: I guess this is where they
24 picked, I guess --

25 MS. CARLISLE: We did do one in

1 Mr. Cohen's office for Placon II. I'm
2 certainly willing to do it in somebody's home
3 if that's been offered, but to date we've
4 only done the one accountant in his
5 residence, I think. And then one in our
6 offices in New York. And we have one this
7 Friday in our offices in Houston for a
8 gentleman who lives in a separate --

9 THE ARBITRATOR: Who's one of
10 Ms. Chaitman's clients?

11 MS. CARLISLE: Yes.

12 MR. HUNT: Yes.

13 THE ARBITRATOR: We've had the
14 discussion today about Exhibit B. For
15 example, as I read Palmer, it's -- well, no,
16 Palmer is a bad example. Palmer does not
17 admit the accuracy of Exhibit B.

18 MS. CHAITMAN: Right.

19 THE ARBITRATOR: But DiGiulian, as we
20 discussed this morning --

21 MS. CHAITMAN: And Dusek.

22 THE ARBITRATOR: -- does.

23 MS. CHAITMAN: And Dusek does and
24 Pearlman does.

25 THE ARBITRATOR: Right. And there

1 were lots of affirmative defenses, but some
2 of those will fall by the wayside by virtue
3 of the stipulation now.

4 MS. CHAITMAN: Right. And Gordon
5 concedes Exhibit B.

6 THE ARBITRATOR: So hopefully it will
7 go more smoothly. So one thing I will direct
8 is that the exhibit binders be produced with
9 exhibit numbers, or letters, at least three
10 days before the deposition -- three business
11 days before the deposition.

12 MR. HUNT: That's fine.

13 MS. CARLISLE: With respect to this
14 Friday's deposition --

15 THE ARBITRATOR: Absolutely.

16 MS. CARLISLE: -- with all due
17 respect. I don't know if I can do that.

18 THE ARBITRATOR: Of course.

19 Is that one of these?

20 MS. CARLISLE: No, sir, it is not,
21 but --

22 THE ARBITRATOR: Okay. And there will
23 be no questioning about issues which have
24 been conceded, which is the Exhibit B
25 discussion and the affirmative defenses.

1 MS. CHAITMAN: So then --

2 MR. HUNT: None of these have been
3 conceded in that way except DiGiulian at this
4 point.

5 MS. CHAITMAN: No, they all have --
6 look, if you just -- I mean, Gordon conceded
7 Exhibit B. Harwood conceded Exhibit B.

8 THE ARBITRATOR: Well --

9 MS. CHAITMAN: Dusek conceded
10 Exhibit B. So then there shouldn't be any
11 questioning.

12 THE ARBITRATOR: Dusek is -- I took
13 random notes, but Dusek -- my note to myself
14 was "truly unqualified, but lots of
15 affirmative defenses." So he didn't have the
16 waffle language on Exhibit B. And some of
17 those affirmative defenses I presume, by
18 virtue of the discussion we had today, will
19 go by the boards.

20 When are these folks currently
21 scheduled for?

22 MR. HUNT: They are not scheduled.
23 The date has passed.

24 MS. CHAITMAN: They're not scheduled.

25 THE ARBITRATOR: So why don't you work

1 out amongst yourselves the extent to which
2 Ms. Chaitman can stipulate, as we indicated
3 today, with respect to these defendants and
4 dropping affirmative defenses. Then see
5 whether there are other issues as to which
6 you need to depose the individual.

7 Harwood is one of the ones --

8 MS. CHAITMAN: Harwood is in her 80s
9 and she's conceded Exhibit B.

10 THE ARBITRATOR: So if the purpose is
11 to -- or a principal purpose is to establish
12 all of this, it seems to me it becomes
13 irrelevant if there's that stipulation.

14 MR. HUNT: If Ms. Chaitman is willing
15 to enter into the exact same stipulation with
16 respect to everything in Exhibit B for every
17 one of her clients, I agree. They haven't
18 done that. They still have all --

19 THE ARBITRATOR: She needs to review
20 one by one.

21 MS. CHAITMAN: I can't concede all of
22 my affirmative defenses. I've conceded the
23 accuracy of Exhibit B with respect to these
24 clients.

25 THE ARBITRATOR: And that certain

1 affirmative defenses, therefore, are --

2 MS. CHAITMAN: Which go to this issue.

3 THE ARBITRATOR: Right.

4 So then you have to make a
5 determination on the trustee's side whether,
6 as to remaining affirmative defenses or any
7 other issue, there's a reason to depose the
8 person.

9 MR. HUNT: So just to be clear then,
10 defendants are entering into the stipulation
11 that everything in Columns 1 through 5 of
12 Exhibit B is accurate for Pearlman, Harwood,
13 Gordon, Palmer and Dusek? They will never
14 contest anything with respect to a transfer
15 in this case.

16 THE ARBITRATOR: Well --

17 MS. CHAITMAN: I did -- I don't -- I
18 don't know what you mean by "never contest"
19 something with respect to a transfer. I'd
20 have to look at the language. I'm not going
21 to concede anything more than of the accuracy
22 of Exhibit B. And that's the issue. I've
23 agreed to waive affirmative defenses that go
24 to the accuracy of Exhibit B.

25 THE ARBITRATOR: Such as Affirmative

1 Defense 20.

2 Well, why don't I say that within one
3 week, you indicate to counsel, with a copy to
4 me, which of these defendants you're willing
5 to make -- enter into that stipulation and
6 make those concessions regarding the
7 affirmative defenses.

8 MS. CHAITMAN: Okay.

9 THE ARBITRATOR: And then you can try
10 and work out the extent to which you wish to
11 depose the others. We can have a phone
12 conference call, if need be --

13 MR. HUNT: Okay.

14 THE ARBITRATOR: -- and work it out.

15 MR. HUNT: Can she also provide us,
16 within that one week, dates for the
17 depositions if we need them?

18 THE ARBITRATOR: Well, logically it
19 seems to me first you ought to find out
20 whether you need the depositions. There's no
21 point in her getting dates if there's not
22 going to be a deposition.

23 MR. HUNT: I'd just like to get some
24 provisional dates because we have got a lot
25 of moving parts with all these cases to try

1 to fit it in. So if you can provide us dates
2 within a week, I'd like to get it --

3 MS. CHAITMAN: The problem is that I'm
4 booked virtually solid with deposition dates
5 in January and through the first half of
6 February. So if you want me to block out
7 dates for witnesses that we may not depose,
8 it's going to make me unavailable for
9 witnesses that we are producing. So I
10 don't --

11 MR. HUNT: I'm not asking you to
12 provide dates for depositions that have
13 already been scheduled. I'm asking for
14 dates --

15 THE ARBITRATOR: She's saying because
16 of those depositions, the dates you get might
17 be in March --

18 MS. CHAITMAN: Yes.

19 THE ARBITRATOR: -- for example.

20 MS. CHAITMAN: That's --

21 MR. HUNT: That's why -- so if I wait,
22 then it's going to be April. So that's --

23 MS. CHAITMAN: I know, but you're only
24 competing with your own firm. It's not --

25 MR. HUNT: If you can give us dates --

1 MS. CHAITMAN: You're talking about 92
2 days of deposition.

3 THE ARBITRATOR: You're going to
4 respond within one week. Why don't we, while
5 we're here today, set up a phone conference
6 and then we can discuss this.

7 MR. HUNT: She's going to respond by
8 the 20th; is that right?

9 THE ARBITRATOR: Right.

10 I can do the 21st or the 22nd. That's
11 Thursday and Friday.

12 MS. CHAITMAN: The 22nd would be good
13 for me.

14 MR. HUNT: 22nd is a Thursday. Could
15 we do like a 3 o'clock call?

16 THE ARBITRATOR: (Nods head in the
17 affirmative.)

18 MR. HUNT: That will give us a day to
19 look at what was sent before we have to talk.

20 THE ARBITRATOR: So it's Thursday, the
21 22nd, at 3 p.m.?

22 MR. HUNT: Yes, sir.

23 THE ARBITRATOR: Works for me.

24 MS. CHAITMAN: That's fine. Thank you
25 very much.

1 THE ARBITRATOR: Sure. Bear with me
2 one second. I saw that there was an order, I
3 don't know whether it's one of your cases, in
4 Greif, Greif.

5 MR. JACOBS: Greif.

6 THE ARBITRATOR: Is that --

7 MR. JACOBS: An order from --

8 THE ARBITRATOR: Yes, there was one
9 where you sent it and said, I sent it
10 prematurely, the order hadn't been entered --

11 MR. HUNT: Oh, yeah, yeah. The order
12 has been entered now.

13 THE ARBITRATOR: -- and now --

14 MR. HUNT: Yes.

15 THE ARBITRATOR: But I have no
16 paperwork, so I have no idea what that's
17 about.

18 MR. HUNT: Okay. Yeah, we need to get
19 that to you.

20 THE ARBITRATOR: Okay.

21 MR. HUNT: We're off the record now.

22 THE ARBITRATOR: Yes.

23 (The time is 4:50 p.m. The
24 hearing concluded.)
25

1 C E R T I F I C A T E

2

3 STATE OF NEW YORK)

4) ss:

5 COUNTY OF WESTCHESTER)

6

7 I, Eileen Mulvenna, CSR/RMR/CRR and a
8 notary public within and for the State of New York,
9 do hereby certify:

10 That I reported the proceedings in the
11 within-entitled matter, and that the within
12 transcript is a true record of such proceedings.

13 I further certify that I am not related by
14 blood or marriage to any of the parties in this
15 matter and that I am in no way interested in the
16 outcome of the matter.

17 IN WITNESS WHEREOF, I have hereunto set my
18 hand this 15th day of December, 2016.

19

20

Eileen Mulvenna, CSR/RMR/CRR

21

22

23

24

25

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